Supreme Court,
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No. 93-1935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix A

Opinion of the Court of Appeals for the Third Circuit
(March 3, 1994) Filed March 3, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 92-5695 and 92-5710

FRANK C. SCHOONEJONGEN; WESLEY L. LOSSON; JOHN S. DUNNING; WILLIAM MARTONE; WILLIAM V. HANZALEK; EDWARD F. ZIEK; MELVIN DEBLOCK; JOSEPH COLQUHOUN; JOSEPH MAJERSCAK; GERARD ABBAMONT; and OLGA WOLSEY, on behalf of themselves and all others similarly situated

v.

CURTISS-WRIGHT CORPORATION

Appellant in No. 92-5695

Frank C. Schoonejongen, Wesley L. Losson, John S. Dunning, William Martone, William V. Hanzalek, Edward F. Ziek, Melvin Deblock, Joseph Colquhoun, Joseph Majerscak, Gerard Abbamont, and Olga Wolsey, on their own behalf and on behalf of the class of persons they represent,

Appellants in No. 92-5710

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 84-04542)

Argued September 10, 1993

BEFORE: STAPLETON, ROTH and LEWIS,
Circuit Judges

(Opinion Filed March 3, 1994)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

This appeal and cross-appeal involve a controversy precipitated by defendant Curtiss-Wright's (CW's) termination of health insurance benefits for former employees who had retired from a plant in Wood-Ridge, New Jersey. The district court found that CW had reserved the right to amend its benefits plan to allow termination of benefits, but that CW had violated ERISA § 402(b)(3), 29 U.S.C. § 1102(b), by failing to include an amendment procedure among the plan's provisions. The court concluded that the lack of an amendment procedure rendered invalid a purported amendment authorizing termination of plaintiffs' benefits. As a result, the district court entered a judgment in excess of $2 million in favor of the plaintiffs' class. It declined, however, to find a non-terminable lifetime right to benefits for the plaintiffs' class. We will affirm.

I. FACTUAL BACKGROUND

The facts are largely undisputed. CW owns a number of industrial plants. One, in Wood-Ridge, New Jersey, opened during World War II and did defense-related work for forty years. Following a period of declining business, this plant closed in late 1983. At that time, CW notified a class of individuals who had retired from the Wood-Ridge plant that their health benefits were being terminated.

In 1984, a number of retirees who had their benefits terminated brought this suit as a class action on behalf of "all those retired Wood-Ridge employees who were not members of the bargaining unit represented by the United Auto Workers at the time of their retirement and whose post-retirement medical benefits were terminated or denied on or about December 1, 1983." The complaint alleged that CW's termination of benefits was wrongful and that the plaintiffs had a vested right to retiree health benefits for life. Plaintiffs sought damages as well as declaratory and injunctive relief.

A. The Benefit Program: 1966-82

In 1966, CW established a post-retirement health benefits program for the Wood-Ridge facility. CW was the plan sponsor and administrator of the plan, as well as its sole source of funding. From 1966 to 1983, the benefits were provided by a succession of health insurance plans provided by several different carriers. Each time a plan terminated and a new one was initiated, notice was apparently sent to the plaintiffs.

From 1966 through 1970, Liberty Mutual provided the insurance benefits. During this period two booklets were sent to retirees stating that benefits would terminate upon death or "if the Group Policy terminates." From 1971 through 1972, Prudential was the insurance carrier for retiree health benefits. Apparently, little, if anything, was provided during this period in the way of documentation. From 1973 through 1974, Blue Cross/Blue Shield provided benefits and CW sent retirees a letter summarizing those benefits. The letter stated that coverage would terminate upon death or "the date the class of persons of which the

retiree is a member ceases to be covered by the program" and also stated that CW "reserves the right to modify, revoke, suspend, change, or terminate the program, in whole or in part." The term "class of persons of which the retiree is a member" was not defined. However, the contract between CW and Blue Cross/Blue Shield included in the classification of employees eligible for benefits: "All full-time salaried non-bargaining exempt and non-exempt Employees retired prior to January 1, 1973" and "All full-time salaried, non-bargaining exempt Employees retired on or after January 1, 1973."

In September, 1976, CW established a welfare benefit plan in accordance with the recently enacted ERISA statute. The plan had a written Constitution and Trust Agreement. The Constitution provided in part that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." It also provided that "the Company reserves the right to terminate the Plan established hereby for any reason at any time." The Constitution did not specify any particular benefits but simply incorporated any "plan or plans" CW might "from time to time adopt." Also at that time, CW changed the manner in which it provided benefits: it began to self-insure, at least with respect to the medical-surgical benefits, and contracted with various carriers to administer the program.

In accordance with ERISA's requirements, Summary Annual Reports (SARs) were provided to plan participants. Starting in 1979, CW added the following reservation language to these SARs: "The company expects and intends to continue this plan indefinitely, but reserves the right to discontinue or amend it."

Plaintiffs claim that from 1976 through 1983, although active employees received Summary Plan Descriptions (SPDs), retirees did not. CW insists that SPDs were sent to retirees. In any event, the 1976 SPD, which was prepared by CW and Prudential and not replaced until 1983, provided in part: "When your employment terminates, or you cease to be a member of a class eligible for insurance under any part of the plan, your insurance under that part

of the plan will cease.... Your insurance under the group policy will also terminate upon discontinuance of the group policy." Nothing in the SPD defined "class," although the underlying agreement between CW and Prudential listed sixteen classes of employees including: "14. All full-time exempt retired salaried employees located in the United States" and "15. All full-time Retired Employees . . . [who] (ii) are classified as full-time non-bargaining non-exempt employees."

A five-page "highlight summary" of exempt retiree benefits, first distributed to exempt retirees in 1973 and revised in 1975 to reflect the change from Blue Shield to Prudential, explained:

> Termination of Coverage
>
> A retiree's coverage will terminate on the date of his or her death or on the date the class of persons of which the retiree is a member ceases to be covered by the Program.
>
> • • • • •
>
> CURTISS-WRIGHT CORPORATION RESERVES THE RIGHT TO MODIFY, REVOKE, SUSPEND, CHANGE, OR TERMINATE THE PROGRAM IN WHOLE OR IN PART, AT ANY TIME.

App. 296-97, 428-29.

B. The Benefit Program: 1982-84

In 1982, CW began adding the following language to all letters, or other documents, involving the benefit plan: "Although the company fully expects to continue this benefit, you should be aware that unlike your retirement benefit which is a vested benefit, the retirement health care coverage is not a guaranteed benefit and therefore is subject to change or termination."

In 1983, concurrent with a change in carriers, a new SPD was issued and distributed to active employees. Plaintiffs and CW dispute whether the SPD was distributed to retirees. This SPD stated: "Coverage under this Plan will cease for retirees and their dependents upon the

termination of business operations of the facility from which they retired." In addition, it stated: "Although the Company expects this Plan to continue in its present form for an indeterminable period, this Plan is not a vested Plan and as such is subject to modification or termination at any time." CW contends that the provision allowing termination of retiree benefits in the event of a plant closure was intended as a clarification; plaintiffs claim it was an amendment.

In November 1983, CW announced that the Wood-Ridge plant would close and that in accordance with the provision in the 1983 SPD, retiree benefits would be cut off for non-bargaining unit employees who retired from the Wood-Ridge plant. This termination of benefits allegedly contradicted oral representations made to many of the retirees that their health benefits would continue for life.[1] The plaintiffs brought this suit in 1984 alleging breach of contract and violations of ERISA.

C. The District Court's Decision

After six years of litigation, the district court issued its decision in 1990 following a bench trial. The court found that CW had reserved the right to amend its plan. In particular, it referred to the express reservation of such a right in the 1976 Plan Constitution, although it noted that other documents also evidenced such a reservation. The district court further found that the term in the 1983 SPD permitting termination of retiree benefits upon closure of the plant at which they had worked was not a clarification of an already existing plan term, but rather was a new term. Accordingly, the district court held that this new term could only be effective if it had been added to the plan as an amendment.

The district court observed that, contrary to ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), the plan did not specify

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1. A number of witnesses, principally members of the plaintiff class, testified that they had been told, usually at their hiring or upon their retirement, that retiree health benefits would continue for life. CW witnesses disputed this.

procedures for amendment of the plan's terms. It further concluded that the manner in which the amendment was added to the plan in this case did not comply with any unpublished amendment procedures. As a result, the district court held that the amendment was invalid. It followed that the termination of plaintiffs' retiree benefits was contrary to the terms of the plan.

CW appeals from the district court's judgment against it; plaintiffs cross appeal from its determinations that CW reserved the right to amend the plan and that plaintiffs have not vested health benefits.[2]

II. CURTISS-WRIGHT'S APPEAL

A. Curtiss-Wright's Failure to Provide an Amendment Procedure

CW insists that: (1) its plan contained an amendment procedure in compliance with ERISA § 402(b)(3) and the 1983 amendment was adopted in accordance with that procedure; and (2) even if there was a violation of ERISA § 402(b)(3), striking a plan term is not an appropriate remedy for a violation of that subsection.

1. Was ERISA § 402(b)(3) Violated?

The provision of CW's plan relating to amendments is the statement in the Constitution and other documents that "[t]he Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the plan." CW contends that this suffices to satisfy the requirements of § 402(b)(3) which provides in part that: "Every employee benefit plan shall— . . . (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan . . . ." 29 U.S.C. § 1102(b)(3) (1988). We disagree.

A simple reservation of a right to amend is not the same as a "procedure for amending [the] plan"; nor does it

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2. We exercise appellate jurisdiction over this case pursuant to 28 U.S.C. § 1291. The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(f).

provide a procedure "identifying the persons who have authority to amend the plan." A primary purpose of § 402(b)(3) is to ensure that all interested parties will know how a plan may be altered and who may make such alterations. Only if they know this information will they be able to determine with certainty at any given time exactly what the plan provides. The reservation in the CW plan does not accomplish these objectives, and acceptance of CW's argument would render requirements of § 402(b)(3) essentially meaningless.

CW cites *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990) in support of its position. In *Huber*, we concluded that a plan provision stating that "the Trustees may amend or modify this plan in whole or in part" specified an acceptable amendment procedure; namely "modification by the Trustees" in a context where amendments had been formally adopted by resolutions at a regularly constituted board meeting in accordance with the established process of the trustees. *Id.* at 106. CW argues by analogy that there was an acceptable amendment procedure specified here; namely, modification by the Company. Section 402(b)(3) states, however, that the procedure provided by the plan must permit the identification of the persons who have the authority to modify the plan; "the Trustees" clearly identifies the authorized persons, "the Company" does not. An individual reading the *Huber* plan could recognize the provision in question as describing a specific procedure for amending the plan; here, one is unable to tell what individuals or bodies within the Company could promulgate an effective amendment. Had the CW plan stated that the plan could be modified by the "Board of Directors," rather than "the Company," then *Huber* might provide an appropriate analogy.[3]

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3. Even if we were willing to equate "by the Company" with "by the board of directors," the record here does not indicate that the 1983 amendment was adopted by CW's board. While Judge Roth agrees with our conclusion that the amendment to the plan was ineffective, she does not agree with our reasoning on this point. Instead, Judge Roth believes that action taken by "the Company" means action taken by the board of directors or whomever of the company has the authority to take such

We conclude that *Huber* is distinguishable. We agree with the district court that CW's plan was in violation of § 402(b)(3).[4]

2. *Does a Violation of § 402(b)(3) Warrant Striking the Purported Amendment?*

In at least three previous cases, we have noted that a violation of § 402(b)(3) *might* prevent any purported amendment from taking effect, but we have expressly declined to decide that question. *See, e.g., Deibler v. Local Union 23*, 973 F.2d 206, 210 n.7 (3d Cir. 1992) ("[A]rguably, ... a plan cannot be amended unless and until an amendment procedure is added to the plan and complied with.") (quoting *Frank v. Colt Industries, Inc.*, 910 F.2d 90, 98 (3d Cir. 1990), citing *Hozier v. Midwest Fasteners, Inc.*,

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action under the corporation law of the state of incorporation of the company in question. As CW is a Delaware corporation, Judge Roth would consider action by "the Company" to be action by the board of directors pursuant to 8 Del. C. § 141(a): "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." Thus the amendment in question here was ineffective because neither CW's board nor any other person or entity within CW with the power to act on behalf of "the Company" ratified it.

4. CW argues that the "amendment procedure" (i.e. modification by the Company) was effectively complied with since agents of the company added the amendment in writing to the plan. It notes that this was not an informal or unwritten plan amendment of the type invalidated in cases like *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990). In addition, the Company's intent to amend was clear, unlike in *Frank v. Colt Industries, Inc.*, 910 F.2d 90 (3d Cir. 1990). Nevertheless, while a written amendment incorporated into the plan's terms and a clear intent to amend may be necessary conditions to a successful amendment, they are not sufficient. ERISA § 402(b)(3) requires that a plan specify amendment procedures and those procedures must be complied with. While written incorporation of a new plan term into the preexisting plan documents may be necessary for employees to understand their rights vis-a-vis the new term, it is also important that employees understand how their rights may be modified in the future; this latter goal can only be accomplished if there are published, enforceable amendment procedures.

908 F.2d 1155, 1163 n.9 (3d Cir. 1990)). This case requires that we now reach that issue.

CW argues that the invalidation of the purported amendment due to the failure of CW to comply with § 402(b)(3) would be inconsistent with our decision in *Hozier*. CW reads *Hozier* as holding that creation of "a substantive remedy for procedural violations of ERISA would contravene ERISA's statutory scheme" and that "procedural violations do not create rights to benefits in disregard of the plan terms." As a general matter, these propositions make sense. However, they are inapplicable here.

Hozier addresses the issue of whether a failure to comply with ERISA's notice or reporting requirements confers a right to receive benefits not provided for in the plan. There is something at stake here far more fundamental than a failure to comply with ERISA's procedural requirements pertaining to reporting and notice. The basic premise of ERISA is that a plan sponsor will be free to determine what benefits the plan will provide, but that once such a determination has been made, the benefits must be described in a written plan that is available to participants at any time upon request. Thereafter the participants are entitled to rely upon the plan document as defining the benefits currently being provided. Unless and until the written plan is altered in a manner, and by a person or persons authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the original plan. It is in this way that ERISA provides certainty and protects participants against frustration of their legitimate expectations.

Unlike the situation in *Hozier* where the plaintiffs sought benefits not provided for in the plan, the plaintiffs' right to benefits in this case is derived exclusively from the terms of the plan; all the district court did was enforce the plan as written. The case law expressly recognizes that amendments which are not adopted substantially in accordance with a plan's amendment procedures are ineffective to alter the terms of a plan. *See, e.g., Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246, 255 (7th Cir. 1991); *Frank*, 910 F.2d at 98 ("Where a

plan has complied with ERISA by setting forth a method for accomplishing amendment, of course each putative amendment will be evaluated with reference to that method."). The same result is required where there are no amendment procedures at all. To hold otherwise would place those who violate § 402(b)(3) by including no procedure for amendment in a plan in a better position than those who comply with that requirement and would thereby discourage employers from complying with § 402(b)(3).

We therefore hold that the absence of an amendment procedure in CW's plan documents renders invalid its purported 1983 amendment allowing termination of plaintiffs' benefits. Contrary to CW's suggestion that such a holding will "undermine the integrity of the plan documents," we conclude that such a holding is necessary to assure the integrity of those documents.

By so holding, we do not suggest that a plan sponsor that reserves a right to amend its plan but neglects to include a provision complying with § 403(b)(3) is forever foreclosed from effectively utilizing its reserved power. The congressional scheme embodied in ERISA will be best served by a rule that an amendment designed solely to bring a plan into compliance with § 403(b)(3) can be effectively adopted by formal action of those who possess the sponsor's final management authority, in the case of CW by formal action of its board of directors. However, unless and until CW's board thus brings its plan into compliance and thereafter a further amendment terminating plaintiffs' benefits is adopted in accordance with the procedures thus designated, plaintiffs are entitled to receive the benefits specified in the plan.[5]

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5. Our holding here should not be construed to extend beyond a situation in which a plan sponsor amends the plan in a fashion which is advantageous to the sponsor's interest and in which the beneficiaries of the plan later challenge that amendment. We do not attempt to encompass in this decision other factual scenarios under which an amendment might be challenged.

B. Curtiss-Wright's Right to Terminate Benefits

Alternatively, CW suggests that we should sustain the November 1983 announcement as a termination of its entire welfare benefit plan and the institution of a new plan without benefits for the retirees of the Wood-Ridge plant. It points out that it reserved the right to terminate its plan as well as to amend it and that § 402(b)(3)'s requirement of a plan provision specifying a process for amendments does not apply to plan terminations. Because CW could have terminated its entire plan without implicating § 402(b)(3) and could then have instituted a new plan without benefits for the Wood-Ridge retirees, CW insists that it should be held to have accomplished the same result in "one step rather than two." We are unpersuaded.

CW's alternative theory will simply not fit the facts of this case. The record is devoid of any evidence that anyone at CW, much less a body having authority to terminate the plan, gave any consideration whatever to the business, public relations, tax or other legal implications of doing so. Moreover, after the announcement, no one at CW treated it as effecting a termination of the plan. No notice of plan termination was sent to all of the plan's participants, for example, as would have been required by ERISA if CW had intended to terminate it. 29 U.S.C. § 1024(b)(1). Most important, it is incumbent on us to look at the economic reality of transactions involving a ERISA plans. To characterize the November 1983 announcement as a termination of CW's welfare benefit plan would be to ignore the reality of the matter. That announcement was nothing more than an application to the Wood-Ridge plant of the 1982 plan amendment, an amendment that CW regarded as only a "clarification" of a continuing plan.

We are confident that the drafters of § 402(b)(3) would view the situation before us as one involving an attempted amendment to the plan in 1982, an amendment that could be effected only in a manner consistent with the requirements of that section. We are not disposed to indulge in a legal fiction in order to sanction an end run around the safeguards Congress there imposed.

III. PLAINTIFFS' CROSS-APPEAL

A. Reservation of Right to Amend

Turning to the cross-appeal, plaintiffs argue that the district court erred in concluding that CW reserved the right to amend its plan. They note that the district court, in so concluding, relied heavily on the reservation language contained in the Plan Constitution. Plaintiffs then stress that the Constitution, by its terms, facially refers only to "employees," not retirees. They further point out that one of CW's witnesses gave testimony susceptible of an interpretation that the Constitution was understood not to apply to the Blue Cross hospitalization program. Thus, according to the plaintiffs, the district court's conclusion about CW's reservation of a right to amend is without record support.

The district court understandably declined to hold that the Constitution and other plan documents were unambiguous as a matter of law. It held a trial in order to put itself in a position to consider all available evidence bearing on the sponsor's intent, the participants' reasonable understanding, and the past practice of the parties. Having considered all of this evidence, the district court made a finding of fact, in accordance with the teachings of *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992), on whether the power to amend had been reserved. We may not disturb that finding unless, viewed in the context of all of the evidence, it is clearly erroneous. We decline to so characterize it.

First, while it is true that the Constitution does not specifically refer to retired employees, there is ample support for the district court's understanding of that document. On its face, the Constitution refers only to employees. It defines employees as individuals who are "intended to be employed for one thousand or more hours in a calendar year or a period of twelve months from an employee's date of hire." According to CW and its witnesses, the employee definition was meant only to distinguish between full-time and part-time employees and was understood to include those employees who had retired

from full-time employment. Moreover, such an intent is reflected in several contemporary documents and is confirmed by the practice of the parties in the administration of the plan. Indeed, it was stipulated by the parties that retiree benefits were provided and administered in accordance with the framework established by the Constitution. Finally, CW's witnesses testified that when retirees asked to see plan documents they would be shown the Constitution as well as other documents.

Moreover, while the district court relied upon the Constitution, it relied as well on the clear and express reservation of the right to amend contained in every SPD following 1979 and in the summary of exempt retiree benefits first distributed in 1973 and revised in 1975.

B. Right to Lifetime Benefits

Plaintiffs acknowledge that the vesting requirements of ERISA do not apply to retiree health benefits. They correctly point out, however, that a sponsor can voluntarily create vested retiree health benefits, and they insist that CW did so. More particularly, they "contend that the Court below erred in failing to recognize that the documents in this case, when considered in light of all the surrounding evidence, created a non-terminable right to receive retiree health insurance benefits for so long as Curtiss-Wright Corporation maintains a post-retirement health insurance program." Plaintiffs' Reply Brief, p. 7. It is apparent from the plaintiffs' brief that they regard this argument as being independent of the preceding argument that the court erred in finding a reserved right to amend. It seems to us, however, that our conclusion in the preceding section is a complete answer to this argument. Even if the plan contained unambiguous assurances that all retirees would have health insurance benefits for life so long as CW maintained a post-retirement health insurance program, the general reserved right to amend the terms of the plan in whole or in part would render the right of any retiree or group of retirees terminable by the adoption of a legally effective amendment.[6]

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6. Contrary to plaintiffs' suggestion, this case is unlike *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992). The issue in that

As we understand plaintiffs' briefs, they seek to avoid the effect of the court's finding of a reserved right to amend by implying that a general right to amend somehow does not authorize an amendment like the one CW purported to adopt in 1983. They explain:

> ... the Court's determination that the Curtiss-Wright Post-retirement health insurance program was amendable did not address the issue of whether a general right to amend the Plan in whole or in part included a right to alter the classes of participants to eliminate benefits for some but not all participants based on a criteria that had never before been set forth as a determinative factor, i.e. whether the plant where someone last worked was still a functioning plant or had been closed.

Plaintiffs' Reply Brief, pp. 7-8.

While the court may not have expressly addressed this issue, it is apparent from the court's opinion that it properly decided it in CW's favor. One important and proper purpose of reserving a general right to amend is to permit the conditioning or cessation of any participants' benefits not vested by virtue of the mandate of ERISA in ways not originally foreseen in order to meet unanticipated changes of circumstance.[7]

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case was whether the arguably limited right of amendment reserved in that Plan was broad enough to authorize the amendment that the sponsor had adopted. Here, the right found by the district court to have been reserved was a general right to amend "in whole or in part, any or all provisions of the Plan." App. 547-48.

7. Plaintiffs' reliance on 29 U.S.C. § 1022(a)(1) is therefore misplaced. Although SPDs, under the requirements of that section, must state the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," they cannot state specific circumstances that are not part of the plan's terms but could hypothetically be added to the plan in the future through a valid amendment. On a similar note, at oral argument plaintiffs relied on our recent decisions in *Fisher v. Philadelphia Elec. Co.*, 994 F.2d 130 (3d Cir. 1993) and *Kurz v. Philadelphia Elec. Co.*, 994 F.2d 136 (3d Cir. 1993). These cases are, however, distinguishable. There, a material issue of fact existed as to

IV. CONCLUSION

The judgment of the district court will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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whether agents of the plan administrator had made affirmative misrepresentations to plan participants, i.e., telling them that the company was not considering an early retirement plan when in fact it was. However, we cautioned that "ERISA does not impose a 'duty of clairvoyance' on fiduciaries" and that "[a]n ERISA fiduciary is under no obligation to offer precise predictions about future changes to its plan." *Fisher*, 994 F.2d at 135.

Appendix B

Opinion of the Court of Appeals for the Third Circuit
(December 28, 1993; vacated March 3, 1994)

Filed December 28, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 92-5695 and 92-5710

FRANK C. SCHOONEJONGEN; WESLEY L. LOSSON; JOHN S. DUNNING; WILLIAM MARTONE; WILLIAM V. HANZALEK; EDWARD F. ZIEK; MELVIN DEBLOCK; JOSEPH COLQUHOUN; JOSEPH MAJERSCAK; GERARD ABBAMONT; and OLGA WOLSEY, on behalf of themselves and all others similarly situated

v.

CURTISS-WRIGHT CORPORATION

Appellant

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 84-04542)

FRANK C. SCHOONEJONGEN; WESLEY L. LOSSON; JOHN S. DUNNING; WILLIAM MARTONE; WILLIAM V. HANZALEK; EDWARD F. ZIEK; MELVIN DEBLOCK; JOSEPH COLQUHOUN; JOSEPH MAJERSCAK; GERARD ABBAMONT; and OLGA WOLSEY, on behalf of themselves and all others similarly situated

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CURTISS-WRIGHT CORPORATION

Frank C. Schoonejongen, Wesley L. Losson, John S. Dunning, William Martone, William V. Hanzalek, Edward F. Ziek, Melvin Deblock, Joseph Colquhoun, Joseph Majerscak, Gerard

Abbamont, and Olga Wolsey, on their own behalf and on behalf of the class of persons they represent,

Appellants

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 84-04542)

Argued September 10, 1993

Before: STAPLETON, ROTH and LEWIS, *Circuit Judges*

(Opinion Filed December 28, 1993)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

This appeal and cross-appeal involve a controversy precipitated by defendant Curtiss-Wright's (CW's) termination of health insurance benefits for former employees who had retired from a plant in Wood-Ridge New Jersey. The district court found that CW had reserved the right to amend its benefits plan to allow termination of benefits, but that CW had violated ERISA § 402(b)(3), 29 U.S.C. § 1102(b), by failing to include an amendment procedure among the plan's provisions. The court concluded that the lack of an amendment procedure rendered invalid a purported amendment authorizing termination of plaintiffs' benefits. As a result, the district court entered a judgment in excess of $2 million in favor of the plaintiffs' class. It declined, however, to find a non-terminable lifetime right to benefits for the plaintiffs' class. We will affirm.

I. Factual Background

The facts are largely undisputed. CW owns a number of industrial plants. One, in Wood-Ridge, New Jersey, opened during World War II and did defense-related work for forty years. Following a period of declining business, this plant closed in late 1983. At that time, CW notified a class of individuals who had retired from the Wood-Ridge plant that their health benefits were being terminated.

In 1984, a number of retirees who had their benefits terminated brought this suit as a class action on behalf of "all those retired Wood-Ridge employees who were not members of the bargaining unit represented by the United Auto Workers at the time of their retirement and whose post-retirement medical benefits were terminated or denied on or about December 1, 1983." The complaint alleged that CW's termination of benefits was wrongful and that the plaintiffs had a vested right to retiree health benefits for life. Plaintiffs sought damages as well as declaratory and injunctive relief.

A. The Benefit Program: 1966-82

In 1966, CW established a post-retirement health benefits program for the Wood-Ridge facility. CW was the plan sponsor and administrator of the plan, as well as its sole source of funding. From 1966 to 1983, the benefits were provided by a succession of health insurance plans provided by several different carriers. Each time a plan terminated and a new one was initiated, notice was apparently sent to the plaintiffs.

From 1966 through 1970, Liberty Mutual provided the insurance benefits. During this period two booklets were sent to retirees stating that benefits would terminate upon death or "if the Group Policy terminates." From 1971 through 1972, Prudential was the insurance carrier for retiree health benefits. Apparently, little, if anything, was provided during this period in the way of documentation. From 1973 through 1974, Blue Cross/Blue Shield provided benefits and CW sent retirees a letter summarizing those benefits. The letter stated that coverage would terminate upon death or "the date the class of persons of which the retiree is a member ceases to be covered by the program" and also stated that CW "reserves the right to modify, revoke, suspend, change, or terminate the program, in whole or in part." The term "class of persons of which the retiree is a member" was not defined. However, the contract between CW and Blue Cross/Blue Shield included in the classification of employees eligible for benefits: "All full-time salaried non-bargaining exempt and non-exempt Employees retired prior to January 1, 1973" and "All full-time salaried, non-bargaining exempt Employees retired on or after January 1, 1973."

In September, 1976, CW established an ERISA plan in accordance with the recently enacted ERISA statute. The plan had a written Constitution and Trust Agreement. The Constitution provided in part that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." It also provided that "the Company reserves the right to terminate the Plan established hereby for any reason at any time." The Constitution did not specify any particular benefits but simply incorporated any "plan or

plans" CW might "from time to time adopt." Also at that time, CW changed the manner in which it provided benefits: it began to self-insure, at least with respect to the medical-surgical benefits, and contracted with various carriers to administer the program.

In accordance with ERISA's requirements, Summary Annual Reports (SARs) were provided to plan participants. Starting in 1979, CW added the following reservation language to these SARs: "The company expects and intends to continue this plan indefinitely, but reserves the right to discontinue or amend it."

Plaintiffs claim that from 1976 through 1983, although active employees received Summary Plan Descriptions (SPDs), retirees did not. CW insists that SPDs were sent to retirees. In any event, the 1976 SPD, which was prepared by CW and Prudential and not replaced until 1983, provided in part: "When your employment terminates, or you cease to be a member of a class eligible for insurance under any part of the plan, your insurance under that part of the plan will cease. . . . Your insurance under the group policy will also terminate upon discontinuance of the group policy." Nothing in the SPD defined "class," although the underlying agreement between CW and Prudential listed sixteen classes of employees including: "14. All full-time exempt retired salaried employees located in the United States" and "15. All full-time Retired Employees . . . [who] (ii) are classified as full-time non-bargaining non-exempt employees."

A five-page "highlight summary" of exempt retiree benefits, first distributed to exempt retirees in 1973 and revised in 1975 to reflect the change from Blue Shield to Prudential, explained:

> Termination of Coverage
>
> A retiree's coverage will terminate on the date of his or her death or on the date the class of persons of which the retiree is a member ceases to be covered by the Program.
>
> • • • • •
>
> CURTISS-WRIGHT CORPORATION RESERVES THE RIGHT TO MODIFY, REVOKE, SUSPEND, CHANGE,

OR TERMINATE THE PROGRAM IN WHOLE OR IN PART, AT ANY TIME.

App. 296-97, 428-29.

B. The Benefit Program: 1982-84

In 1982, CW began adding the following language to all letters, or other documents, involving the benefit plan: "Although the company fully expects to continue this benefit, you should be aware that unlike your retirement benefit which is a vested benefit, the retirement health care coverage is not a guaranteed benefit and therefore is subject to change or termination."

In 1983, concurrent with a change in carriers, a new SPD was issued and distributed to active employees. Plaintiffs and CW dispute whether the SPD was distributed to retirees. This SPD stated: "Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired." In addition, it stated: "Although the Company expects this Plan to continue in its present form for an indeterminable period, this Plan is not a vested Plan and as such is subject to modification or termination at any time." CW contends that the provision allowing termination of retiree benefits in the event of a plant closure was intended as a clarification; plaintiffs claim it was an amendment.

In November 1983, CW announced that the Wood-Ridge plant would close and that in accordance with the provision in the 1983 SPD, retiree benefits would be cut off for non-bargaining unit employees who retired from the Wood-Ridge plant. This termination of benefits allegedly contradicted oral representations made to many of the retirees that their health benefits would continue for life.[1] The plaintiffs brought this suit in 1984 alleging breach of contract and violations of ERISA.

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1. A number of witnesses, principally members of the plaintiff class, testified that they had been told, usually at their hiring or upon their retirement, that retiree health benefits would continue for life. CW witnesses disputed this.

C. *The District Court's Decision*

After six years of litigation, the district court issued its decision in 1990 following a bench trial. The court found that CW had reserved the right to amend its plan. In particular, it referred to the express reservation of such a right in the 1976 Plan Constitution, although it noted that other documents also evidenced such a reservation. The district court further found that the term in the 1983 SPD permitting termination of retiree benefits upon closure of the plant at which they had worked was not a clarification of an already existing plan term, but rather was a new term. Accordingly, the district court held that this new term could only be effective if it had been added to the plan as an amendment.

The district court observed that, contrary to ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), the plan did not specify procedures for amendment of the plan's terms. It further concluded that the manner in which the amendment was added to the plan in this case did not comply with any unpublished amendment procedures. As a result, the district court held that the amendment was invalid. It followed that the termination of plaintiffs' retiree benefits was contrary to the terms of the plan.

CW appeals from the district court's judgment against it; plaintiffs cross appeal from its determinations that CW reserved the right to amend the plan and that plaintiffs have no vested health benefits.[2]

II. *Curtiss-Wright's Appeal*

A. *Curtiss-Wright's Right to Terminate Benefits*

CW does not dispute before us the district court's finding that its plan, prior to 1983, contained no provision specifically authorizing the plan to cease paying health benefits to the plaintiffs upon the closing of the plant where

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2. We exercise appellate jurisdiction over this case pursuant to 28 U.S.C. § 1291. The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(f).

they had been employed. CW argues, however, that it was authorized to terminate the health benefits of the retirees from the Wood-Ridge plant in 1983 because the plan documents authorized it to terminate the plan at any time, and this authority necessarily implied the authority to terminate any portion of the plan. Because CW could have terminated the entire plan, and then initiated a new plan without benefits for the Wood-Ridge retirees, CW insists that it should be held to have accomplished the same result in "one step rather than two." We are unpersuaded.

As CW stresses, the district court found that CW had reserved the right to amend the plan, as well as to terminate it. Thus, if the district court's findings be accepted, there is no question but that CW had the power to terminate non-vested benefits, provided it followed the proper procedures. CW's argument that its reservation of the right to terminate the plan implies a right to terminate part of the plan is therefore beside the point. The district court agreed that CW could terminate plaintiffs' benefits; the only question was what CW had to do in order to terminate these benefits.

In order to have effectively terminated its plan, CW would have had to comply with the plan termination procedures mandated by ERISA and the ERISA regulations. *See, e.g.*, 29 U.S.C. 1341(b); 53 Fed. Reg. 1904. In order to have effectively amended its plan, CW would have had to adopt an amendment in a manner consistent with the amendment requirements found in § 402 of ERISA. 29 U.S.C. § 1102. We decline to adopt CW's suggestion that its right to terminate the plan gives it the right to terminate certain benefits without complying with *either* the termination or amendment procedures.

If a plan is to cease paying benefits to a class of participants upon the happening of a certain event, the plan must be able to point to some authority for such a cessation in the terms of the plan.[3] Prior to 1983, the terms

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3. We agree with the district court that a reservation of a right to terminate or amend a plan is not the same as a plan term providing that a class of participants may have their benefits terminated upon the happening of a contingent event. *Cf.* 29 U.S.C. § 1022(b) (stating that SPDs must include a statement of "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits").

of CW's plan concededly did not provide that a retiree's health benefits could terminate upon the closure of the plant from which the individual retired. It follows that the plan had no authority to cease paying plaintiffs' health benefits in 1983 absent an effective amendment or an effective termination having the effect of eliminating those benefits.[4] CW does not purport to have complied with ERISA's requirements for plan termination. Accordingly, the crucial issue, as the district court held, was whether CW's plan was effectively amended in that year.

B. Failure to Provide an Amendment Procedure

CW insists that: (1) its plan contained an amendment procedure in compliance with ERISA § 402(b)(3) and the 1983 amendment was adopted in accordance with that procedure; and (2) even if there was a violation of ERISA § 402(b)(3), striking a plan term is not an appropriate remedy for a violation of that subsection.

1. Was ERISA § 402(b)(3) Violated?

The provision of CW's plan relating to amendments is the statement in the Constitution and other documents that "[t]he Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the plan." CW contends that this suffices to satisfy the requirements of § 402(b)(3) which provides in part that: "Every employee benefit plan shall— . . . (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan . . . ." 29 U.S.C. § 1102(b)(3) (1988). We disagree.

A simple reservation of a right to amend is not the same as a "procedure for amending [the] plan"; nor does it provide a procedure "identifying the persons who have

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4. It is possible that a limited termination of benefits could be treated as a partial termination of the plan under certain circumstances. *See, e.g.*, Stephen R. Bruce, *Pension Claims: Rights and Obligations*, 563-83 (2d ed. 1993); I.R.C. § 411(d)(3) (1988). There is, however, no indication here that CW sought to treat its action as a partial termination or to comply with procedures regarding a partial termination.

authority to amend the plan." A primary purpose of § 402(b)(3) is to ensure that all interested parties will know how a plan may be altered and who may make such alterations. Only if they know this information will they be able to determine with certainty at any given time exactly what the plan provides. The reservation in the CW plan does not accomplish these objectives, and acceptance of CW's argument would render requirements of § 402(b)(3) essentially meaningless.

CW cites *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990) in support of its position. In *Huber*, we concluded that a plan provision stating that "the Trustees may amend or modify this plan in whole or in part" specified an acceptable amendment procedure; namely "modification by the Trustees" in a context where amendments had been formally adopted by resolutions at a regularly constituted board meeting in accordance with the established process of the trustees. *Id.* at 106. CW argues by analogy that there was an acceptable amendment procedure specified here; namely, modification by the Company. Section 402(b)(3) states, however, that the procedure provided by the plan must permit the identification of the persons who have the authority to modify the plan; "the Trustees" clearly identifies the authorized persons, "the Company" does not. An individual reading the *Huber* plan could recognize the provision in question as describing a specific procedure for amending the plan; here, one is unable to tell what individuals or bodies within the Company could promulgate an effective amendment. Had the CW plan stated that the plan could be modified by the "Board of Directors," rather than "the Company," then *Huber* might provide an appropriate analogy.[5]

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5. Even if we were willing to equate "by the Company" with "by the board of directors," the record here does not indicate that the 1983 amendment was adopted by CW's board. While Judge Roth agrees with our conclusion that the amendment to the plan was ineffective, she does not agree with our reasoning on this point. Instead, Judge Roth believes that action taken by "the Company" means action taken by the board of directors or whomever of the company has the authority to take such action under the corporation law of the state of incorporation of the

We conclude that *Huber* is distinguishable. We agree with the district court that CW's plan was in violation of § 402(b)(3).[6]

2. *Does a Violation of § 402(b)(3) Warrant Striking the Purported Amendment?*

In at least three previous cases, we have noted that a violation of § 402(b)(3) *might* prevent any purported amendment from taking effect, but we have expressly declined to decide that question. *See, e.g., Deibler v. Local Union 23*, 973 F.2d 206, 210 n.7 (3d Cir. 1992) ("[A]rguably, . . . a plan cannot be amended unless and until an amendment procedure is added to the plan and complied with.") (quoting *Frank v. Colt Industries, Inc.*, 910 F.2d 90, 98 (3d Cir. 1990), citing *Hozier v. Midwest Fasteners, Inc.*,

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company in question. As CW is a Delaware corporation, Judge Roth would consider action by "the Company" to be action by the board of directors pursuant to 8 Del. C. § 141(a): "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." Thus the amendment in question here was ineffective because neither CW's board nor any other person or entity within CW with the power to act on behalf of "the Company" ratified it.

6. CW argues that the "amendment procedure" (i.e. modification by the Company) was effectively complied with since agents of the company added the amendment in writing to the plan. It notes that this was not an informal or unwritten plan amendment of the type invalidated in cases like *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990). In addition, the Company's intent to amend was clear, unlike in *Frank v. Colt Industries, Inc.*, 910 F.2d 90 (3d Cir. 1990). Nevertheless, while a written amendment incorporated into the plan's terms and a clear intent to amend may be necessary conditions to a successful amendment, they are not sufficient. ERISA § 402(b)(3) requires that a plan specify amendment procedures and those procedures must be complied with. While written incorporation of a new plan term into the preexisting plan documents may be necessary for employees to understand their rights vis-a-vis the new term, it is also important that employees understand how their rights may be modified in the future; this latter goal can only be accomplished if there are published, enforceable amendment procedures.

908 F.2d 1155, 1163 n.9 (3d Cir. 1990)). This case requires that we now reach that issue.

CW argues that the invalidation of the purported amendment due to the failure of CW to comply with § 402(b)(3) would be inconsistent with our decision in *Hozier*. CW reads *Hozier* as holding that creation of "a substantive remedy for procedural violations of ERISA would contravene ERISA's statutory scheme" and that "procedural violations do not create rights to benefits in disregard of the plan terms." As a general matter, these propositions make sense. However, they are inapplicable here.

Hozier addresses the issue of whether a failure to comply with ERISA's notice or reporting requirements confers a right to receive benefits not provided for in the plan. There is something at stake here far more fundamental than a failure to comply with ERISA's procedural requirements pertaining to reporting and notice. The basic premise of ERISA is that a plan sponsor will be free to determine what benefits the plan will provide, but that once such a determination has been made, the benefits must be described in a written plan that is available to participants at any time upon request. Thereafter the participants are entitled to rely upon the plan document as defining the benefits currently being provided. Unless and until the written plan is altered in a manner, and by a person or persons, authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the original plan. It is in this way that ERISA provides certainty and protects participants against frustration of their legitimate expectations.

Unlike the situation in *Hozier* where the plaintiffs sought benefits not provided for in the plan, the plaintiffs' right to benefits in this case is derived exclusively from the terms of the plan; all the district court did was enforce the plan as written. The case law expressly recognizes that amendments which are not adopted substantially in accordance with a plan's amendment procedures are ineffective to alter the terms of a plan. *See, e.g., Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246, 255 (7th Cir. 1991); *Frank*, 910 F.2d at 98 ("Where a

plan has complied with ERISA by setting forth a method for accomplishing amendment, of course each putative amendment will be evaluated with reference to that method."). The same result is required where there are no amendment procedures at all. To hold otherwise would place those who violate § 402(b)(3) by including no procedure for amendment in a plan in a better position than those who comply with that requirement and would thereby discourage employers from complying with § 402(b)(3).

We therefore hold that the absence of an amendment procedure in CW's plan documents renders invalid its purported 1983 amendment allowing termination of plaintiffs' benefits. Contrary to CW's suggestion that such a holding will "undermine the integrity of the plan documents," we conclude that such a holding is necessary to assure the integrity of those documents.

By so holding, we do not suggest that a plan sponsor that reserves a right to amend its plan but neglects to include a provision complying with § 403(b)(3) is forever foreclosed from effectively utilizing its reserved power. The congressional scheme embodied in ERISA will be best served by a rule that an amendment designed solely to bring a plan into compliance with § 403(b)(3) can be effectively adopted by formal action of those who possess the sponsor's final management authority, in the case of CW, by formal action of its board of directors. However, unless and until CW's board thus brings its plan into compliance and thereafter a further amendment terminating plaintiffs' benefits is adopted in accordance with the procedures thus designated, plaintiffs are entitled to receive the benefits specified in the plan.[7]

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7. Our holding here should not be construed to extend beyond a situation in which a plan sponsor amends the plan in a fashion which is advantageous to the sponsor's interests and in which the beneficiaries of the plan later challenge that amendment. We do not attempt to encompass in this decision other factual scenarios under which an amendment might be challenged.

III. Plaintiffs' Cross-Appeal

A. Reservation of Right to Amend

Turning to the cross-appeal, plaintiffs argue that the district court erred in concluding that CW reserved the right to amend its plan. They note that the district court, in so concluding, relied heavily on the reservation language contained in the Plan Constitution. Plaintiffs then stress that the Constitution, by its terms, facially refers only to "employees," not retirees. They further point out that one of CW's witnesses gave testimony susceptible of an interpretation that the Constitution was understood not to apply to the Blue Cross hospitalization program. Thus, according to the plaintiffs, the district court's conclusion about CW's reservation of a right to amend is without record support.

The district court understandably declined to hold that the Constitution and other plan documents were unambiguous as a matter of law. It held a trial in order to put itself in a position to consider all available evidence bearing on the sponsor's intent, the participants' reasonable understanding, and the past practice of the parties. Having considered all of this evidence, the district court made a finding of fact, in accordance with the teachings of *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992), on whether the power to amend had been reserved. We may not disturb that finding unless, viewed in the context of all of the evidence, it is clearly erroneous. We decline to so characterize it.

First, while it is true that the Constitution does not specifically refer to retired employees, there is ample support for the district court's understanding of that document. On its face, the Constitution refers only to employees. It defines employees as individuals who are "intended to be employed for one thousand or more hours in a calendar year or a period of twelve months from an employee's date of hire." According to CW and its witnesses, the employee definition was meant only to distinguish between full-time and part-time employees and was understood to include those employees who had retired

from full-time employment. Moreover, such an intent is reflected in several contemporary documents and is confirmed by the practice of the parties in the administration of the plan. Indeed, it was stipulated by the parties that retiree benefits were provided and administered in accordance with the framework established by the Constitution. Finally, CW's witnesses testified that when retirees asked to see plan documents they would be shown the Constitution as well as other documents.

Moreover, while the district court relied upon the Constitution, it relied as well on the clear and express reservation of the right to amend contained in every SPD following 1979 and in the summary of exempt retiree benefits first distributed in 1973 and revised in 1975.

B. Right to Lifetime Benefits

Plaintiffs acknowledge that the vesting requirements of ERISA do not apply to retiree health benefits. They correctly point out, however, that a sponsor can voluntarily create vested retiree health benefits, and they insist that CW did so. More particularly, they "contend that the Court below erred in failing to recognize that the documents in this case, when considered in light of all the surrounding evidence, created a non-terminable right to receive retiree health insurance benefits for so long as Curtiss-Wright Corporation maintains a post-retirement health insurance program." Plaintiffs' Reply Brief, p. 7. It is apparent from the plaintiffs' brief that they regard this argument as being independent of the preceding argument that the court erred in finding a reserved right to amend. It seems to us, however, that our conclusion in the preceding section is a complete answer to this argument. Even if the plan contained unambiguous assurances that all retirees would have health insurance benefits for life so long as CW maintained a post-retirement health insurance program, the general reserved right to amend the terms of the plan in whole or in part would render the right of any retiree or group of retirees terminable by the adoption of a legally effective amendment.[8]

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8. Contrary to plaintiffs' suggestion, this case is unlike *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992). The issue in that

As we understand plaintiffs' briefs, they seek to avoid the effect of the court's finding of a reserved right to amend by implying that a general right to amend somehow does not authorize an amendment like the one CW purported to adopt in 1983. They explain:

> . . . the Court's determination that the Curtiss-Wright Post-retirement health insurance program was amendable did not address the issue of whether a general right to amend the Plan in whole or in part included a right to alter the classes of participants to eliminate benefits for some but not all participants based on a criteria that had never before been set forth as a determinative factor, i.e. whether the plant where someone last worked was still a functioning plant or had been closed.

Plaintiffs' Reply Brief, pp. 7-8.

While the court may not have expressly addressed this issue, it is apparent from the court's opinion that it properly decided it in CW's favor. One important and proper purpose of reserving a general right to amend is to permit the conditioning or cessation of any participants' benefits not vested by virtue of the mandate of ERISA in ways not originally foreseen in order to meet unanticipated changes of circumstance.[9]

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case was whether the arguably limited right of amendment reserved in that Plan was broad enough to authorize the amendment that the sponsor had adopted. Here, the right found by the district court to have been reserved was a general right to amend "in whole or in part, any or all provisions of the Plan." App. 547-48.

9. Plaintiffs' reliance on 29 U.S.C. § 1022(a)(1) is therefore misplaced. Although SPDs, under the requirements of that section must state the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," they cannot state specific circumstances that are not part of the plan's terms but could hypothetically be added to the plan in the future through a valid amendment. On a similar note, at oral argument plaintiffs relied on our recent decisions in *Fisher v. Philadelphia Elec. Co.*, 994 F.2d 130 (3d Cir. 1993) and *Kurz v. Philadelphia Elec. Co.*, 994 F.2d 136 (3d Cir. 1993). These cases are, however, clearly distinguishable. There, a material issue of fact existed

IV. Conclusion

The judgment of the district court will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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as to whether agents of the plan administrator had made affirmative misrepresentations to plan participants, i.e., telling them that the company was not considering an early retirement plan when in fact it was. However, we cautioned that "ERISA does not impose a 'duty of clairvoyance' on fiduciaries" and that "[a]n ERISA fiduciary is under no obligation to offer precise predictions about future changes to its plan." *Fisher*, 994 F.2d at 135.

Appendix C

Opinion of the District Court for the District of New Jersey after Trial (October 4, 1990)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 84-4542

FRANK C. SCHOONEJONGEN, et al.,

Plaintiffs,

—vs—

CURTISS-WRIGHT CORPORATION,

Defendant.

Newark, New Jersey
Tuesday, October 4, 1990

Before:

HONORABLE JOHN W. BISSELL,
United States District Judge

Appearances:

LEWIS, GREENWALD, KENNEDY, LEWIS,
CLIFTON & SCHWARTZ, ESQS.,
BY: THOMAS KENNEDY, ESQ.,
—and—
IRA CURE, ESQ.,
Attorneys for the Plaintiffs.

CARPENTER, BENNETT & MORRISSEY, ESQS.,
BY: ROSEMARY ALITO, ESQ.,
—and—
KEVIN DUFFY, ESQ.,
Attorneys for the Defendant.

AARON J. CARR, ESQ.,
Attorney for Defendant.

OPINION

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record of taken stenographically in the above entitled proceedings.

/s/ IRA N. RUBENSTEIN
Ira N. Rubenstein
Official Court Reporter

THE COURT: Initially for the record in this matter the Court incorporates, and by reference, the stipulated facts from the pretrial order appearing in paragraph two thereof, and because of that, need not recite a number of those facts specifically but they ought to be deemed incorporated.

The Court also notes by way of supplement to the stipulated facts, "its findings," with regard to the terminology appearing in several documents referred to at page 13 of its opinion of August 12, 1988. More particularly, they're summarized in the various expressions of the reservation of rights to terminate or amend the plan which, as the Court's Opinion today will reveal, the Court believes are effective to assert, establish and preserve those rights of amendment and termination to Curtiss-Wright.

While the specific documents and timing of those documents may be less than ideal, it is clear that Curtiss-Wright did, in fact, reserve a right to amend the Plan. In addition to the quoted portions appearing at page 13 of the Court's opinion of August 12, 1988, the Court notes as well that reserved right is expressly stated on the Plan's constitution (J-64) executed in 1976 which is an effective, adequate recitation of that right. Given the ERISA philosophy not to hastily construe a plan to create vested interest where there are none, that is in plans such as health benefit plans, the record would have to reveal by a preponderance of the evidence that in this case such benefits vested. Here they did not. At most, plaintiffs showed that a program was in place, benefits were there, and if not terminated or amended, they would remain throughout a retiree's retirement. But those benefits were not unchangeable.

The language of the plan around which this litigation has pivoted appears at page 32 of J-119, the origins and date of which are clearly a matter of public record. It is essentially the 1983 publication. That language, under a clear heading of Termination of Health Care Benefits, states and I quote:

"Coverage under this plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired."

With the termination of business operations at the Wood-Ridge facility, the defendant, Curtiss-Wright, invoked this provision to terminate these hospital, medical, surgical, sometimes collectively called health benefits, for the retirees who formed a member of plaintiff class.

This Court finds and determines that the addition to the plan of the language just quoted providing for a termination of benefits in the event of a plant closing constituted an amendment of the plan, not a clarification of existing terms as defendant contends. The language is a specific reference, triggered by a specific event, namely the District Court decision in *International Union, United Automobile Aerospace and Agricultural Implement Workers of America v. Yard-Man*. The

argument that the additional language was merely a clarification, or described a particular subset of persons already under an existing provision is unavailing, as consideration of the following exhibits shows.

The Court has reviewed in this context the exhibits recited by the plaintiff in oral argument and notes that particularly such exhibits as J-30, J-39 and J-53, do not support the contention of the defendant that the terminology providing for the termination of benefits for a "class of persons" can logically or otherwise be construed so that a class of persons is synonymous either in this case or generally with the retirees from the Wood-Ridge facility. The indications from those various exhibits, while the classes and classifications may vary within them, in no way support an argument that would make class of persons synonymous with the retirees of the Wood-Ridge plant.

Accordingly, the Court determines, as I've mentioned a moment ago, that the amended language about the cessation of benefits on termination of business operations at the facility from which one retires, cannot be deemed to be in any way a clarification or description of a subset of the so-called class of persons previously expressed in prior publications on the Plan as being a group subject to termination.

This Court finds that the Plan continues because it was not terminated. Other retirees, exempt and nonexempt, from other plants in operation are still covered by these benefits.

Accordingly, to summarize the first phase of this opinion, the 1983 addition, which I've quoted already, is indeed an amendment to the Plan.

The Court further determines that the amendment was not effectively promulgated. The reasons that the amendment is not effective include the following:

First, under ERISA Section 402(b)(3), 29 U.S.C. Section 1102(b)(3), a procedure for amending the plan must be provided in the Plan documents. In this case it wasn't.

Secondly, under *Huber v. Casablanca Industries*, and *Hozier v. Midwest Fasteners, Inc.*, two recent Slip Opinions

from the Third Circuit that have been referred to frequently throughout this litigation, a plan may not be amended by informal means. When a plan with such procedures is, in fact, amended, the effectiveness thereof will be evaluated by reference to those procedures. Let me restate that sentence.

When a plan with such procedures is amended, the effectiveness thereof will be evaluated by reference to those procedure such as they may have been.

I have already commented there were no written procedures to the amendment set forth in the evidence before this Court. The analysis might arguably stop there under the statute and under a permissible reading of *Huber* and *Hozier*. However, the Court has also considered in this case the testimony of Mr. Du Bois which suggests there may have been an unwritten procedure for amending the plan involving the submission to a certain executive committee which he described. However, as the defendant admits, even those procedures were not followed in the case of the 1983 amendatory language.

The argument before the Court that somehow or other a de facto compliance with those unpublished amendment procedures took place because of the membership of that committee and its knowledge of these events is completely unpersuasive particularly in the face of ERISA's requirements and underlying purpose. Indeed in this case the purported amendment was not even considered by Curtiss-Wright to be an amendment at all. Of course, I have ruled to the contrary. Here it was done as a matter of routine redrafting, and is therefore not effective. The Court must therefore look to the 1983 booklet without such amendment as the governing document. Strictly construed and so examined, this booklet, because of the ineffective purported amendment, once again J-119, does not contain a termination provision containing even the "class of persons" language. The Court therefore is left with a plan that has no provision for cessation of benefits on termination of class coverage. None of the three preceding paragraphs remaining effective on page 32 of J-119 are subject to such a construction. Secondly, however, even if the

earlier documents were to govern, these plaintiffs, the Wood-Ridge retirees, are not a "class of persons" for reasons previously stated.

In this Court's view that disposes of the essential issues before it. However, I wish to make perfectly clear, certain grounds on which this decision is not based because they were raised in the course of oral argument. This decision is not based on the analysis that if there is an amendment here, at best it operates as to plan number 508 leaving intact plans 502 and 504 for the benefit of the plaintiffs. Such a basis is unnecessary in light of the Court's decision that the amendment is ineffective in all respects. In addition, the Court agrees that plans numbered 502 and 504 were within and a duplication in part of the overall plan number 508.

Secondly, this decision is not based on the argument that J-119 is effective as to active employees only. It does indeed refer to retirees and the benefits which they will enjoy. In addition, notice of the critical and contested amendment materially affecting the retirees who are the present class was received as of November of 1983, a few months after the issuance of J-119.

By the way, in using the word "class" at that point, I'm referring to them as a class in this class action, once again having already determined they are not a "class of persons" within the terminology of the plan.

Thirdly, this Court does not nullify the amendment of 1983, which I have previously described, on the basis of any bad faith enactment on the brink of the closing of Wood-Ridge. The Court accepts the evidence of Carr and DuBois, though conflicting, as to who initiated the language that worked its way into the draft early in the lengthy evolution of J-119.

As stated at the outset of this Opinion, the Court is not agreeing with the plaintiff's argument that the Plan's constitution (J-64) cannot serve as an effective reservation of the defendant's right to amend. J-64 and J-54 were generated due to the enactment of ERISA, which is the underpinning of this

action. The constitution is an appropriate source of the reserve right to amend the plan, at least as early as 1976.

The Court will not issue any advisory opinion with respect to the response of this Court or any other tribunal if defendant were to immediately enact a formal procedure to amend the plan, and then follow it to effectuate the amendment it ineffectively attempted in 1983.

Given the Court's determination, however, that there is a right to amend, and given the determination that none of the plaintiffs established an entitlement to vested health benefits for life (rather, any such benefits, while they might endure through retirement, are still subject to amendment or termination), the Court will not issue an injunction barring any amendment to those benefits in the future. Instead, this Court is merely issuing a declaratory judgment that those benefits are currently in effect, and have been up to today's date.

As a final note, although the plaintiffs were earlier divided into subclasses for purposes of this case, this decision applies equally to all members of each subclass, and these distinctions between the plaintiffs are inapplicable as to the right to the declaratory relief which the Court has just enunciated.

Mr. Kennedy, I would ask if you would, please, to prepare a form of judgment reflecting the decision which the Court has reached.

I would like at the earliest opportunity, including right now, if you feel reasonably comfortable in doing so, to convene a conference with regard to we're we go from here particularly in terms of the assertion of claims.

On the other hand, if both sides feel that time for some personal consideration, reflection, both with the client and others is appropriate, that it would be better to convene such a conference at some time next week, I think I would accede to that.

Mr. Kennedy, do you have a preference?

MR. KENNEDY: Well, your Honor, I think some of that really depends on whether it is the intention of the defendant

to seek an interlocutory appeal with the judgment as to liability. I think we should know that before—

THE COURT: I understand; a Section 1292(b) certification or else an order from the Court under Rule 54, I believe that this partial judgment is to be deemed final for the purposes of appealability. I certainly would not, you know, would not forecast how to treat those.

Ms. Alito.

MS. ALITO: I'm certain we'll make those applications to your Honor.

THE COURT: Let's leave this thinking a little bit. I will be in touch with you if you're not in touch with me, sometime middle of next week because I feel Mr. Kennedy and everyone recognizes the case has been pending a long time even up to this point and I seriously want to consider what procedures might be employed for the purpose of moving ahead with the establishment of any individual entitlements.

Anything further at this time, Mr. Kennedy?

MR. KENNEDY: Your Honor, just like to note that perhaps there will be further time to do it but it is our intent to make a motion for interim attorney fees, an award based on the work we performed to date.

We would appreciate having the opportunity to have that matter placed before your Honor and resolved prior to the point of which the appeal is heard so that to the extent there are questions that flow not only from the decision as to liability but as to the decision that you reach in connection with attorneys' fees, they can be considered together so they may be resolved all at once.

THE COURT: You have that right and you know the motion schedule provided by our local rules. That's at the moment in your hands rather than in anyone else's.

Anything further at this time?

MR. KENNEDY: No, your Honor.

THE COURT: Ms. Alito?

MS. ALITO: No, your Honor.

THE COURT: All right. Thank you.

(Court adjourned.)

Appendix D

Opinion of the District Court on Motion for §1292(b) Certification (December 17, 1990)

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 84-4542

FRANK C. SCHOONEJONGEN, et. al., on behalf of themselves and all others similarly situated,

Plaintiffs,

—v.—

CURTISS-WRIGHT CORPORATION,

Defendant.

OPINION

APPERANCES:

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BISSELL, *District Judge*

This matter arises before the Court on the basis of defendant Curtiss-Wright's motion for certification pursuant to 28 U.S.C. § 1292(b), in order that it may appeal this Court's determination of liability issues in the case. Plaintiffs do not oppose the motion, and instead only request that the proceedings, including discovery for the damages phase of the trial (which has not yet been held), continue pending the appeal.

FACTS AND BACKGROUND

The facts have been extensively considered and expressed in prior opinions of this Court. References to them will be limited to those particularly pertinent to the present motion.

This Court, sitting without a jury, conducted a trial as to liability only and determined that defendant is liable to the plaintiffs (retirees from defendant's Wood-Ridge facility) for improperly terminating their post-retirement health benefits. In an oral opinion from the bench on October 4, 1990, this Court made several specific findings of relevance to this motion. First, the Court found that although the documents provided by the defendant to describe its retirement plan were less than clear, Curtiss-Wright did in fact reserve a right to amend the plan. This reservation is in the Constitution as well as numerous other contemporanous documents. Second, the Court found that the language concerning termination of plan

benefits at a plant closing constituted an amendment to the plan because this term was not originally a part of that plan. This language did not, as defendant contended, constitute merely a clarification of an existing provision. Next, the Court determined that the amendment was not effectively promulgated. Under ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), a procedure for amending the plan must be provided in the plan documents. It was not. Under *Huber v. Casablanca Industries*, (slip op. at Exh. A to Defendant's Br.), and *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990), the Third Circuit held that a plan may not be amended by informal means. When a plan with procedures is amended, the effectiveness of the amendment is determined by reference to those procedures. The Court also found that there was in existence a sort of informal procedure for amending the plan which also was not followed in this instance. Under any of the applicable plan documents, plaintiffs' benefits were never effectively terminated.

Defendant's Motion for Certification

Curtiss-Wright moves for certification under 28 U.S.C. § 1292(b) so that it may appeal this Court's determination as to liability only.

Defendant asserts that the holding of this Court as to its liability is dependent on three separate controlling questions of law:

> 1. Whether, as a matter of law, an employer's unfettered and expressly reserved right to terminate a welfare benefit plan at any time encompasses the right to terminate benefits for any particular group under the plan;
>
> 2. Whether the Court erroneously construed ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), to find that Curtiss-Wright had failed to comply with it;

3. Whether a procedural violation of § 402(b)(3) invalidates a plan amendment which the employer had the right to make and which was incorporated in writing in a formal plan document.

Defendant argues that there is a substantial basis for difference of opinion with respect to each of these questions and that appellate consideration of these questions of law at this time would materially advance the termination of this litigation. A summary of these arguments follows.

Defendant first argues that there is a substantial basis for a difference of opinion as to this Court's holding that Curtiss-Wright was required to amend the plan in order to terminate plaintiffs' benefits. (Defendant's Br. at 2-5). Essentially, defendants are making the argument that because they reserved the right to terminate the whole plan, they had the right to terminate a part (*i.e.*, plaintiffs' part) of the plan. In support of this argument, defendant relies on trust principles. Thus, Curtiss-Wright was not required to amend the plan in 1983 before lawfully terminating plaintiffs' benefits.

Next, defendant argues that there are substantial bases for difference of opinion on controlling issues of law with respect to the construction and application of ERISA § 402(b)(3) (which states: "Every employee benefit plan shall . . . provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan."). (Defendant's Br. at 5-18). There are two parts to this argument.

Defendant argues that this Court's construction of ERISA § 402(b)(3) to require Curtiss-Wright to follow a more formal procedure for plan amendment conflicts with the purpose of that section and with *Huber* (slip op. attached to Defendant's Br.). In *Huber*, the Third Circuit found that a plan did provide for a procedure, "Modification by the Trustees," and evaluated the amendment accordingly. (*Id.* at 46). Based on this and other cases, defendant argues that its reservation of the right to amend carries with it the inherent procedure

for amendment adequate to satisfy ERISA § 402(b)(3). (Defendant's Br. at 8-9). Defendant also contends that because the amendment was incorporated into a plan document, it complied with this procedure in a manner consistent both with plan documents and with the fundamental purpose of § 402(b)(3). (*Id.*, at 10).

The second portion of defendant's § 402(b)(3) argument is that even if it had not complied with that section, there is a substantial basis for a difference of opinion as to the Court's holding that a violation of that section invalidates the amendment. (*Id.* at 11-18). Based on *Hozier* and other cases, defendant argues that this Court's invalidation of the amendment, which was in plan documents, derogated the efficacy of having plan terms as set forth in plan documents. (*Id.* at 11). Defendant also argues that a violation of § 402(b)(3) is nothing more than a "procedural" violation, like a disclosure violation, which does not invalidate the terms of the plan. (*Id.* at 12).

Defendant next argues that there is no reason to hold this amendment invalid inasmuch as it makes no difference to employees whether the amendment was properly promulgated or not so long as they receive notice, in contrast to the situation where an employer gives no notice. (*Id.* at 13). Further, defendant argues that invalidating an amendment is only appropriate where the violation "threatens the fundamental integrity of the plan documents." (*Id.* at 14). Defendant also argues that permitting invalidation of an amendment which has been incorporated into a formal plan document "infects the plan documents with uncertainty." (*Id.* at 17). Thus, defendant asserts that there is a substantial basis for difference of opinion whether the Court correctly invalidated the termination language in the 1983 SPD based on a violation of ERISA § 402(b)(3).

Defendant next asserts that appeal on these issues will materially advance termination of this litigation because if the Third Circuit disagrees with this Court on any of these ques-

tions, it will be unnecessary to continue with the discovery and trial of the damages issues in this case.

Plaintiffs do not oppose this motion, as indicated above, and request only that the damages portion of this case continue pending this motion and any appeal that might follow.

DISCUSSION

Certification

Defendant seeks a certification under 28 U.S.C. § 1292(b), which provides as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be *of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.* The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(First emphasis added; last emphasis in original). Title 28 U.S.C. § 1292(b) "is designed to allow for early appeal of a legal ruling when resolution of an issue may provide more efficient disposition of the litigation." *Ford Motor Credit Co. v. S.E. Barnhart & Sons*, 664 F.2d 377, 380 (3d Cir. 1981).

As indicated above, the parties agreed that the liability and damages portion of this case should be bifurcated. Accordingly, this Court has yet to determine the damages suffered by each of the several hundred plaintiffs. Defendant

contends that permitting an appeal of the liability issue therefore could avoid the "costly and time-consuming discovery and trial" necessary to determine those damages.

The Court believes that there is no substantial ground for difference of opinion on the grounds upon which the Court's decision is based.[1] Furthermore, quantification of the damages of the class members does not presently appear to be a particularly complex and lengthy matter. There should be no delays in proceeding to determine and pay the sums to which the plaintiffs, all of them senior citizens, are entitled. One must keep in mind that this action was filed in 1984. An interlocutory appeal would serve no practical, economic benefit to anyone if the damages phase of the case continued pending such an appeal. If all proceedings in the damages phase were stayed pending an interlocutory appeal, the conclusion of this litigation would not be "materially advance[d];" rather it would be unduly delayed, to the inevitable prejudice of the aging plaintiff class. Defendant's motion for certification of this Court's determination upon liability, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), is denied.

/s/ JOHN W. BISSELL
JOHN W. BISSELL
United States District Judge

DATED: December 17th, 1990

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[1] Rather, it finds the defendant's arguments hypertechnical and strained given the basic, straightforward grounds for the decision reflected in this Court's opinion.

Appendix E

Order of the District Court on Motion for §1292(b) Certification (December 17, 1993)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 84-4542

FRANK C. SCHOONEJONGEN, et. al., on behalf of themselves and all others similarly situated,

Plaintiffs,

—v.—

CURTISS-WRIGHT CORPORATION,

Defendant.

ORDER

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 17th day of December, 1990,

ORDERED that defendant's motion for certification of this Court's determination upon liability, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), is denied.

/s/ JOHN W. BISSELL
JOHN W. BISSELL
United States District Judge

Appendix F

Decision of the District Court on Cross-Motions for Summary Judgment (April 11, 1986)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil 84-4542 (JWB)

FRANK C. SCHOONEJONGEN, et. al.,

Plaintiffs,

—v.—

CURTISS-WRIGHT CORPORATION,
a Delaware Corporation,

Defendant.

Before:

HON. JOHN W. BISSELL, U.S.D.J.

Appearances:

(DECISION OF THE COURT)

Pursuant to Section 753 Title 28 United States Code the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

/s/ LARRY HENNEFELD
Larry Hennefeld, C.S.R.,
Official Court Reporter

TRANSCRIPT OF PROCEEDINGS

This case arises out of a complaint filed on October 31, 1984, by a group of retired supervisors, administrators, and other non-union workers formerly employed by defendant Curtiss-Wright Corporation at its Wood-Ridge, New Jersey facility. On August 14, 1985, the named plaintiffs were certified as class representatives of the class composed of all non-bargaining unit employees who retired from employment at Curtiss-Wright's Wood-Ridge facility.

The two count complaint as amended alleges that the defendant's termination of the post-retirement health benefits provided to the retirees pursuant to an employee benefit plan was arbitrary and capricious and in violation of the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1001 *et. seq.* (Count I). The amended complaint further alleges that the defendant's actions and the plaintiffs' reasonable and detrimental reliance upon them create a federal common law contract right to the post-retirement benefits (Count II).

The matter is currently before the Court on the plaintiffs' motion for partial summary judgment on Counts I and II and the defendant's cross-motion for partial summary judgment on Counts I and II.

Most of the facts of this case are undisputed. In 1966 Curtiss-Wright established a post-retirement health benefits program for the employees of its Wood-Ridge facility. The health benefits program was an unfunded plan meaning that a trust fund was never established. Rather, the plan was paid for on an annual basis by Curtiss-Wright. From the institution of the plan in 1966 until January 1, 1971, the benefits were provided through Liberty Mutual Insurance Company. The scope of the plan was set forth in Certificates of Insurance issued by Liberty Mutual.

In 1971, the group policy with Liberty Mutual was terminated and a new policy with Prudential obtained. In 1973, the group policy with Prudential was terminated and new policies

with Blue Cross and Blue Shield obtained. In January 1975, the Blue Shield policy was terminated and a new group policy with Prudential was obtained for medical-surgical coverage. (The Blue Cross policy for hospitalization was continued.) In 1976, Curtiss-Wright became self-insured for medical-surgical benefits, terminated the Prudential policy, and entered into an administrative services contract with Prudential to administer its self-insured coverage. Finally, in February, 1983, Curtiss-Wright became self-insured for both medical-surgical and hospitalization, terminated its contracts and policies, and established a new plan with Blue Cross and Blue Shield as administrator.

With the exception of the last plan no plan expressly provided for the termination of the benefits upon the closing of the facility at which the retiree had been employed. Regarding termination, the plans between 1966 and 1983 generally provided that coverage under the Plan would terminate if the retiree died or became eligible for Medicare benefits, if the Group Policy terminated, or if the class of persons of which an individual was a member ceased to be covered by the Plan.

When the summary plan description of the last plan was issued it contained a new provision for the termination of health care benefits, that being that:

"Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired."

The insertion of that termination provision was the first time that the defendant had given notice that the continuation of health benefits was contingent upon the continued operation of the facility from which the employee retired. On November 4, 1983, the defendant notified the retirees that the Wood-Ridge facility would be closed at the end of the month and that their post-retirement health benefit coverage was being terminated. The plan itself, however, was not terminated.[1]

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[1] Post-retirement health benefits have been continued for those retirees whose last active employment for defendant was in other facil-

I. *The ERISA Claim*

"ERISA is a comprehensive statutory scheme designed to protect employees enrolled in pension and benefit plans . . . one very important policy underlying ERISA is that employees enrolled in a benefit plan should not be deprived of compensation that they reasonably anticipate under the plan's purported coverage." *Northeast Dept. ILGWU v. Teamsters Local Union No. 229*, 764 F.2d 147, 162-3 (3d Cir. 1985). 29 U.S.C. Section 1002 defines "employee *welfare* benefit plans" and expressly distinguishes them from "employee benefit plans". Both are "employee benefit plans" regulated by ERISA. However, 29 U.S.C. Section 1003 limits the scope of the restrictions imposed upon welfare benefit plans. Section 1003(a) states that ERISA governs employee welfare benefit plans except as otherwise provided in, *inter alia*, Sections 1051 and 1081, which, in turn, exempt employee welfare benefit plans from ERISA's stringent participation, vesting, and funding standards. See *In re White Farm Equipment Co.*, 42 B.R. 1005, 1012 (N.D. Ohio 1984), expedited appeal granted (April 15, 1985), suggestion of bankruptcy filed staying appeal (June 24, 1985).

Under ERISA's vesting rules, only accrued benefits must be nonforfeitable. 29 U.S.C. Section 1053(a).

"The term 'accrued benefit' refers to pension or retirement benefits *and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance*, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately. *To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.* Also, where the employee moves from one employer to another, the ancillary benefits (which are usually on a contingency basis)

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ities and for those retirees who were considered "corporate" employees rather than employees at the Wood-Ridge facility at the time of their retirement.

would often be provided by the new employer, whereas the new employer normally would not provide pension benefits based on service with the old employer."

Conference Report, reprinted at 1974 U.S. Code Cong. & Admin. News at 4726. (emphasis added)

"An employee therefore can 'accrue' no 'vested' right to medical insurance benefits". *Musto v. American General Corp.*, 615 F. Supp. 1483, 1496 (M.D. Tenn. 1985); See also *Viggiano v. Shenango China Division of Anchor Hocking*, 750 F.2d 276, 279 (3d Cir. 1984) ("ERISA does not require an employer to establish a hospitalization plan *nor continue it indefinitely*", emphasis added). The Third Circuit in *Viggiano* cited with approval, *Sutton v. Weirton Steel Div. of National Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 2387 (1984), for the proposition that even though a company acts as an administrator of its own pension plan it "could terminate ancillary, nonvested benefits without violating ERISA". 750 F.2d at 279-80. Accordingly, it is clear that the defendant did not have an express duty under ERISA to maintain the health benefits in question.

While not alleged in the amended complaint, in their brief the plaintiffs also argue that Curtiss-Wright failed to comply with ERISA's reporting and disclosure requirements. 29 U.S.C. Sections 1021 and 1022 require that employee benefit plan administrators furnish every covered participant and every beneficiary with a summary plan description which shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. "[The] summary plan description must not mislead, misinform, or fail to inform participants and beneficiaries of the Plan" *Genter v. Acme Sales & Supply Co.*, 776 F.2d 1180, 1185 (3d Cir. 1985).

Plaintiffs argue that Curtiss-Wright failed to meet that aspect of its fiduciary duty since at no time prior to the 1983 plan summary being distributed did Curtiss-Wright inform the participants and beneficiaries of the Plan that their benefits would terminate upon the closing of the facility from which they retired.

In opposition, Curtiss-Wright argues that contrary to the plaintiff's characterization of the employee welfare benefit plan as comprising one unending plan which began in 1966 and continued into 1983, the health program actually consisted of a series of health insurance plans, with each plan providing advice of possible termination, and each terminating in accordance with that advice.[2] Curtiss-Wright contends that the implementation of each new plan either explicitly or implicitly informed the beneficiary of the predecessor plan's termination.

A determination of the issue of whether Curtiss-Wright breached its fiduciary duty of disclosure necessarily depends on whether the Plan was one unending Plan as plaintffs contend or whether it was a series of Plans instituted and then terminated. That determination would seem to be a mixed question of fact and law. Clearly, the factual issues are in dispute and, accordingly, the granting of summary judgment is not possible.

As to Count I of the amended complaint, therefore, the Court grants Curtiss-Wright's motion for summary judgment to the extend that that Count sought to impose an expressed statutory duty under ERISA to continue to maintain the employee welfare benefit plan involved herein. However, the Court does not grant summary judgment to either side regarding any other claims contained in Count I.

II. *The Federal Common Law Claim*

"[A]lthough welfare benefit plans are not subject to the vesting and participation provisions of ERISA, an employee nevertheless may acquire a contractual interest in such benefits, enforceable under federal common law". *Musto v. American General Corp.*, 615 F. Supp. 1483, 1497 (M.D. Tenn. 1985). That contractual interest arises from the presence of a unilateral offer given by the employer and the

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[2] As stated earlier the Plans stated that an individual's coverage would terminate if the Group Policy was terminated.

acceptance by way of continued employment and eventual retirement by the employee. Necessarily, however, the intent of the parties must be determined, often through an examination of the plan documents.

In this case analysis of the plan documents first require a determination of whether the Plan was in fact one uninterrupted plan as plaintiffs characterize it or whether it was a series of plans as characterized by the defendant. That factual determination, as stated earlier, cannot be made on this summary judgment motion.

Once that determination is made, the Court will then have to determine whether or not Curtiss-Wright had a contractual right to terminate the health benefits to some or all of the retirees. On the record as is presently stands, the Court cannot make that determination.

The cross-motions of the parties for summary judgment on Count II of the amended complaint are denied.

Appendix G

Opinion of the District Court on Cross-Motions for Summary Judgment (August 15, 1988)

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 84-4542

FRANK C. SCHOONEJONGEN, et al.,

Plaintiffs,

—v.—

CURTISS-WRIGHT CORPORATION,

Defendant.

APPEARANCES:

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(Attorneys for Defendant)

OPINION

BISSELL, *District Judge*

This case arises out of a complaint filed on October 31, 1984, by a group of retired supervisors, administrators, and other non-union workers formerly employed by defendant Curtiss-Wright Corporation at its Wood-Ridge, New Jersey facility. On August 14, 1985, the named plaintiffs were certified as class representatives of the class composed of all non-bargaining unit employees who retired from employment at Curtiss-Wright's Wood-Ridge facility.

The two-count complaint as amended alleges that the defendant's termination of post-retirement health benefits provided to the retirees pursuant to an employee benefit plan was arbitrary and capricious and in violation of the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* (Count I). The amended complaint further alleges that the defendant's actions and the plaintiffs' reasonable and detrimental reliance upon them create a federal common law contract right to the post-retirement benefits (Count II). Plaintiffs seek to compel defendant to immediately reinstate post-retirement health benefits to all members of the plaintiff class.

This case is currently before the Court on the plaintiffs' motion to divide the plaintiff class into two subclasses, one subclass consisting of all members of the plaintiff class who ceased active employment with defendant Curtiss-Wright on

or before April 1, 1983 and the other subclass consisting of all members of the plaintiff class who ceased active employment with Curtiss-Wright after April 1, 1983. In addition, the plaintiff subclass consisting of those members of the class who left active employment prior to April 1, 1983, move for summary judgment on Counts I and II. Defendant Curtiss-Wright has cross-moved for summary judgment on Counts I and II, as to all plaintiffs.

Identical cross-motions for summary judgment were before this Court in April 1986. At that time, this Court held that medical insurance benefits are not accrued benefits under ERISA but are considered ancillary, nonvested benefits which may be terminated without violating ERISA. *Schoonejongen v. Curtiss-Wright Corp.*, Civil No. 82-4542, slip op. at 6-7 (D.N.J. April 11, 1986) (citing *Viggiano v. Shenango China Division of Anchor Hocking*, 750 F.2d 276, 279-80 (3d Cir. 1984)). Accordingly, this Court found that "it is clear that the defendant did not have an express duty under ERISA to maintain the health benefits in question." *Id.* at 7.

Plaintiffs also presented an alternative argument for granting summary judgment on Count I, that defendant Curtiss-Wright failed to comply with ERISA's reporting and disclosure requirements. As to this alternative theory of recovery under ERISA, this Court concluded as follows:

> A determination of the issue of whether Curtiss-Wright breached its fiduciary duty of disclosure necessarily depends on whether the Plan was one unending Plan as plaintiffs contend or whether it was a series of Plans instituted and then terminated. That determination would seem to be a mixed question of fact and law. Clearly, the factual issues are in dispute and, accordingly, the granting of summary judgment is not possible.

Id. at 8. Thus, Curtiss-Wright's motion for summary judgment as to Count I was granted to the extent that the plaintiffs sought to impose an express statutory duty under ERISA to continue to maintain the Employee Welfare Benefit Plan

involved herein and the cross-motions for summary judgment regarding any other claims contained in Count I were denied.

The parties' cross-motions for summary judgment on Count II were similarly denied because a determination of whether Curtiss-Wright had a contractual right to terminate the retirees' health benefits hinges in part on whether the Plan was in fact one uninterrupted plan as plaintiffs characterize it or a series of plans as characterized by defendant. *Id.* at 9. After several months of additional discovery on this issue of fact, the parties now renew their summary judgment motions, which they contend are ripe for determination.

FACTUAL BACKGROUND

Most of the facts of this case are undisputed. In 1966 Curtiss-Wright established a post-retirement health benefits program for the employees of its Wood-Ridge facility.[1] It is undisputed that these benefits were provided through a non-contributory[2] employee health benefit plan that was designed to provide varying benefits to both active and retired employees. Curtiss-Wright was and is both the plan sponsor and administrator of the program. The benefits in question were not the subject of any collective bargaining agreement. Plaintiffs contend these health benefits were provided pursuant to a single ongoing benefit program which began in 1966 and continued into 1983. Defendant, however, knew these benefits to have been provided by a succession of health insurance plans terminated each time the insurer was changed, notice of which was provided to plaintiffs upon the implementation of each new successive plan, thereby either

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[1] Post-retirement health benefits are not provided to all Curtiss-Wright employees but only employees of certain Curtiss-Wright facilities, including the Wood-Ridge, Buffalo and Flight Systems divisions. Alito Aff. of 3/10/86, Exh. A (Ehinger Dep.) at 48.

[2] The term "noncontributory" describes a plan under which benefits are funded solely by the employer.

explicitly or implicitly informing the beneficiaries of the predecessor plan's termination.

The health insurance benefits made available by this employee benefits program were provided by a succession of insurance carriers. From the institution of the plan in 1966 until January 1, 1971, the actual health insurance benefits were provided through Liberty Mutual Insurance Company ("Liberty Mutual"). The scope of the plan was set forth in Certificates of Insurance issued by Liberty Mutual and distributed to all eligible active and retired Curtiss-Wright employees. *See* Pl. Statement of Uncontested Facts, Exh. A. In addition to the Certificates of Insurance, Curtiss-Wright issued two pamphlets during this coverage period describing its post-retirement health insurance program. Both of these booklets distributed by Curtiss-Wright contained provisions addressing termination of insurance. The first booklet, which had an effective date of July 1, 1966, contained the following statement under the heading "Termination of Insurance":

> Your insurance, or that of a dependent, will terminate if you, or such dependent, becomes eligible for Medicare benefits under the Federal Social Security Act, in the event of your death, or if the Group Policy terminates.[3]

Id., Exh. B at 4. The second pamphlet, which appears to have been prepared in 1970, similarly stated:

> Your insurance, or that of a dependent, will terminate in the event of your death, or if the Group Policy terminates.

Id., Exh. C at 8. These provisions in the booklets prepared and distributed by Curtiss-Wright were not contradicted by the underlying Certificates of Insurance issued by Liberty

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[3] While this booklet contained no specific reference to the duration or continuation of coverage other than this termination clause, there is a broad statement under the heading "covered expenses," which provides:

> Benefits under this insurance coverage will be payable for expenses covered which are incurred by an insured retired employee or his eligible dependents on and after July 1, 1966.

Pl. Statement of Uncontested Facts, Exh. B at 1.

Mutual. Those certificates specifically stated that the benefits provided thereunder would be reduced by the value of Medicare benefits given covered individuals and addressed termination of insurance with respect to covered dependents only. *Id.*, Exh. A. Only one of the three Certificates of Insurance provided the Court contains a provision on termination of insurance of the covered retiree. *See id.*, Exh. A-3. That Certificate states that the insurance of a protected person ceases upon eligibility for medicare or "upon his death prior thereto." *Id.* at 3.

In 1971, Liberty Mutual was terminated as Curtiss-Wright's insurance provider and a new contract with Prudential Insurance Company of America ("Prudential") was obtained. This relationship remained in effect until 1973. Neither the policy pursuant to which post-retirement health benefits were provided through Prudential nor any booklet prepared by Curtiss-Wright describing the coverage provided through Prudential during this period have been made a part of the record. With respect to this coverage period, the only documents before the Court are Coverage Riders to the Group Policy, which contained no statements as to the duration or termination of coverage. *See id.*, Exh. D.

After termination of the Group Policy with Prudential in 1973, Curtiss-Wright entered into agreements with Blue Cross and Blue Shield of New Jersey to provide active and retired employee health insurance benefits. Curtiss-Wright's contract with Blue Cross provided for termination of an employee's coverage upon notification by the employer that coverage of an employee is to be terminated, with no specific grounds for such termination specified except leaving the employ of the employer. *Id.*, Exh. F at 16. A similar provision is contained in the Group Contract between Curtiss-Wright and New Jersey Blue Shield. *Id.*, Exh. G at 16-17. These contracts also contained a provision specifying that they would be automatically renewed from year to year unless terminated by either party in writing with 60 days notice. *See Id.*

Coinciding with this changing of insurers to Blue Cross and Blue Shield, a new booklet outlining Curtiss-Wright's Group

Health Benefits was prepared. In this pamphlet, Curtiss-Wright addressed the issue of termination of these group health benefits:

> **Termination of Benefits** . . . Your benefits will continue throughout your retirement or until the date the class of persons of which you are a member ceases to be covered by the Program. A dependent's coverage terminates when your coverage terminates or on the last day of the month in which he or she ceases to meet the qualifications of an eligible dependent. In the event of your death, your dependents will continue to be covered until the end of the calendar month following the month of your death. However, should you or any of your dependents be receiving covered inpatient care at the time your coverage terminates, benefits will continue to be provided to the extent available for that confinement.

Id., Exh. E at 4. Nowhere in this booklet does Curtiss-Wright define the term "class of persons of which you are a member." However, both contracts between Curtiss-Wright and Blue Cross and Blue Shield, under which the benefits outlined in this booklet were provided, contain an identical "Schedule A" outlining the classification of employees eligible for coverage under the agreement. Included in the classification of employees eligible for benefits are:

> All full-time salaried non-bargaining exempt and non-exempt Employees retired prior to January 1, 1973.
>
> All full-time salaried, non-bargaining exempt Employees retired on or after January 1, 1973.

Id., Exh. F at 2 and Exh. G at 3.

In January 1975, the insurance carrier for the medical-surgical portion of the post-retirement health benefit program was changed from Blue Shield back to Prudential. The Group Policy with New Jersey Blue Cross for hospitalization was continued. This arrangement with Prudential remained in place for one year. The only documents produced with respect to this Group Policy are Coverage Riders which do not

address the issue of continuation or termination of an employee's coverage. *See id.*, Exh. H.

Curtiss-Wright continued to obtain its employee hospitalization insurance through New Jersey Blue Cross until 1983. However, in September 1976, defendant terminated its Group Policy with Prudential for medical-surgical benefits, became self-insured for these benefits, and entered into an Administrative Services Contract with Prudential to administer its self-insured coverage program. Correspondingly, Curtiss-Wright established and funded the Curtiss-Wright Employee Benefit Plan for the purpose of providing for the payment of life, health and other benefits to employees, their dependents and/or beneficiaries. Under the constitution of the Curtiss-Wright Employee Benefit Plan, effective September 1, 1976, the company specifically reserved the right to amend or modify the Plan:

> 1. *General.* The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan. No such modification or amendment shall make it possible for any of the funds of the Trust established under the Plan adopted by the Company to be used for or diverted to purposes other than for the exclusive benefit of employees, their dependents, or their allowed beneficiaries and expenses, prior to satisfaction of all liabilities with respect to them.

England Aff., Exh. H at 5-6. The constitution also provided for termination of the Plan:

> 1. *Termination by Company.* The Company reserves the right to terminate the Plan established hereby for any reason at any time. In case of termination, the Fund under the Plan shall be used for the exclusive benefit of employees, their dependents, and their allowed beneficiaries as of the time of such termination, except that funds in a Trust not required to satisfy all liabilities of the Fund for benefits and expenses because of an erroneous computation shall be returned to the Company and

Participants in proportion to the amounts each such contributor shall have contributed with respect to such Trust.

2. *Termination for Other Reasons.* The Constitution and the Company's liabilities under the Plan shall terminate upon the Company's legal dissolution, adjudication as a bankrupt, making of a general assignment to and for the benefit of creditors.

Id. at 6-7. Simultaneously with the establishment of this Employee Benefit Plan, Curtiss-Wright also entered into a Trust Agreement with New Jersey Bank, as trustee of the fund provided thereunder. *See id.*, Exh. G.

Pursuant to the Administrative Services Agreement between Curtiss-Wright and Prudential, the persons to whom the plan of benefits applied were divided into sixteen classes, and different summary plan description booklets were provided to each group of employees. Retirees were divided into three classifications under this agreement:

14. All full-time Exempt Retired Salaried Employees located in the United States.

15. All full-time Retired Employees (other than Employees of Target Rock Corporation and Marquette Metal Products Company, subsidiaries of Curtiss-Wright Corporation), who (i) are in bargaining units represented by unions with whom the Employer has entered into collective bargaining agreements or (ii) are classified as full-time non-bargaining non-exempt Employees.

16. All full-time Retired Employees of Marquette Metal Products Company, a subsidiary of Curtiss-Wright Corporation, who (i) are covered by a collective bargaining agreement existing between the Employer and UAW Local 527, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America or (ii) are classified as full-time non-bargaining non-exempt Employees.

Pl. Statement of Uncontested Facts, Exh. I at Exh. A.

The members of the plaintiff class herein clearly fall within the retiree classifications set forth in ¶¶ 14 and 15(ii), depending on their exempt or non-exempt status. Neither party has produced the summary plan description booklets containing the applicable benefits for either of these classifications. Rather, the booklet submitted provides the employee benefit plan applicable to all active employees of Curtiss-Wright's Wood-Ridge plant who were full-time non-bargaining, non-exempt employees.[4] *See id.*, Exh. J. Evidential for present purposes are the termination of coverage provisions of the booklet applicable to active employees, which provided that termination of coverage can occur for the following reasons: "when your employment terminates," when "you cease to be a member of a class eligible for coverage under this plan," and upon "discontinuance of the plan." *Id.*, Exh. J at 63. The July 1, 1978 amendment to the Administrative Services Agreement between Prudential and Curtiss-Wright makes clear that this booklet, applicable to active full-time non-bargaining non-exempt employees of the Wood-Ridge facility, was replaced by a new plan of benefits, which also has not been provided to the Court.

After 1973, Curtiss-Wright provided summary descriptions of benefits in response to employee and retiree requests for information on the plan. Defendant admits that "[a]t first, these typewritten explanations contained neither a promise nor a warning about the duration of benefits." Def. Brief at 15. Instead, this synopsis described the exact medical benefits available to eligible retirees, while providing no notice or even any mention of what circumstances, if any, could result in a termination of benefits. *See* Pl. Statement of Uncontested Facts, Exh. K. A similar document, dated 1978, also contains no statement as to the possibility of termination of these benefits. *See id.*, Exh. L.

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[4] It is clear this booklet applies to active employees and not retirees because the general information on coverage explicitly states that coverage ends when employment terminates and ceasing active work is considered to be immediate termination of employment. Pl. Statement of Uncontested Facts, Exh. J at 63.

Curtiss-Wright, however, contends that beginning in 1975, the effective date of ERISA, the program description given to employees and retirees outlining the post-retirement health benefits contained clear reservations of rights to terminate, amend or modify the benefits program. *See id.*, Exh. M (undated document). In making this statement, defendant relies on a document entitled, "The Curtiss-Wright *Executive* Post-Retirement Health Benefits Program" (emphasis added). As to that portion of the plaintiff class who fall into the category of an "executive," if any do, defendants contend that after 1975 they were informed of the following possibilities of termination of coverage:

> A retiree's coverage will terminate on the date of his or her death or on the date the class of persons of which the retiree is a member ceases to be covered by the Program.
>
> * * *
>
> CURTISS-WRIGHT CORPORATION RESERVES THE RIGHT TO MODIFY, REVOKE, SUSPEND, CHANGE, OR TERMINATE THE PROGRAM IN WHOLE OR IN PART, AT ANY TIME.

Id.

Of the documents required to be provided employees and retirees in accordance with the disclosure and notice provisions of ERISA, the parties have provided to the Court the summary annual report for the years 1979 to 1983 on the Curtiss-Wright Employee Welfare Benefit Plan. *See* England Aff., Exhs. B, C, D, E and F. While these summaries do not address termination of individual plan members' coverage, they contain a general statement that:

> The company expects and intends to continue this plan indefinitely, but reserves the right to discontinue or amend it.

Id.

Beginning in 1982, Curtiss-Wright management implemented a new policy under which the company was to include the following clause at the end of every hand-out of any type which describes the post-retirement health care coverage offered by the company:

> Although the Company fully expects to continue this benefit, you should be aware that unlike your retirement benefit which is a vested benefit, the retirement health care coverage is not a guaranteed benefit and therefore is subject to change or termination.

Pl. Statement of Uncontested Facts, Exh. P. However, this new addition to program summaries did not specify what event could cause such a change or termination of benefits. Although this policy was adopted in 1982, no plan document has been presented to the Court which contained this disclaimer before April 1983.

In February 1983, defendant Curtiss-Wright became self-insured for both medical-surgical and hospitalization health insurance benefits. It accordingly terminated its hospitalization group policy with Blue Cross and its Administrative Services Contract for medical-surgical coverage with Prudential and established a new self-insured program with Blue Cross and Blue Shield as administrator. Following this change, a new summary plan description booklet was issued which contained the following provision on termination of health care benefits:

> Coverage for you and your dependents terminates on the last day of the month in which you cease to be an eligible employee of Curtiss-Wright or any of its named subsidiaries which are covered under this Plan.
>
> Coverage for dependents will cease when he or she no longer meets the definition of an "Eligible Dependent" as described on page 3 of this booklet.
>
> All coverage under this Plan will cease upon discontinuance of the Plan for any reason.

> *Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired.*

Pl. Statement of Uncontested Facts, Exh. V at 32 (emphasis added). The insertion of this termination provision expressly providing for the discontinuance of the benefits upon the closing of the facility at which the retiree had been employed was the first time the defendant had explicitly stated that the continuation of post-retirement health benefits was contingent upon the continued operation of the facility from which the employee retired. In addition, at the very end of this booklet, the issue of plan continuation is addressed:

> **Plan Continuation**—The Company expects and intends to continue this Plan indefinitely but reserves the right to end or amend it.
>
> . . .
>
> Although the Company expects this Plan to continue in its present form for an indeterminable period, this Plan is not a vested Plan and as such is subject to modification or termination by the Company at any time.

Id. at 36.

On November 4, 1983, defendant notified the plaintiff retirees that its Wood-Ridge, New Jersey facility would be closed at the end of the month and that their post-retirement health benefit coverage was being terminated. The Curtiss-Wright Employee Benefit Plan itself, however, was not terminated.[5]

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[5] Post-retirement health benefits have continued for those retirees whose last active employment for defendant was in other facilities covered by the Curtiss-Wright Employee Benefit Plan and for those retirees covered by the Plan who were considered "corporate" employees rather than employees at the Wood-Ridge facility at the time of their retirement.

ARGUMENT

I. Plaintiffs' Motion to Subdivide the Plaintiff Class

In their motion to divide the plaintiff class pursuant to Federal Rule of Civil Procedure 23(c)(4), plaintiffs seek to have the Court establish two subclasses of plaintiffs, one containing all class members who left active employment prior to April 1, 1983, and the other containing all class members who remained in active employment after April 1, 1983. The date of April 1, 1983 has been selected by plaintiffs as the crucial date for these purposes, because that is when Curtiss-Wright for the first time expressly stated, as pertains to its post-retirement health insurance benefits, that it reserved the right to terminate these benefits in the event of a plant shutdown. In addition, the terminology "left active employment" is being used because the booklet containing this reservation was distributed to active employees only, and there are employees who left active employment prior to the distribution of the booklet who did not officially retire until sometime later, after exhaustion of severance benefits.

Initially, defendant Curtiss-Wright contends that the 1983 Blue Cross/Blue Shield booklet governs the claims of all plaintiffs, making subclasses unnecessary, and that the present action is not appropriate for resolution as a class action due to the vast differences with respect to each plaintiff. Nonetheless, Curtiss-Wright goes on to state that it "does not oppose the creation of subclasses as to the claims which retain class action status, but submits that plaintiffs' proposal does not go far enough." Def. Brief at 60. Defendants propose the plaintiff class be subdivided according to which booklet or program of benefits was in effect at the time of their retirement, thereby resulting in seven subclasses. *See id.* at 61.

At oral argument on this motion, the Court resolved plaintiff's motion, in part, stating:

> The plaintiffs' motion to designate two subclasses along the lines reflected by Mr. Lewis [plaintiffs' counsel] is granted. The Court can see a significant, although perhaps not ultimately determinative, distinction between

> those two groups based upon the terminology in the 1983 booklet which appeared for the first time, including that which is particularly at issue here, which says, "Coverage under this plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired."
>
> I would add that this determination by the Court at this point is without prejudice to further potential subclassification, should the arguments advanced by the defendant prevail regarding those who retired prior to the 1983 booklet. Whether that relief will be granted ultimately as a result of the motions presently before me or otherwise is yet to be determined by the Court.

Transcript of Proceedings of 6/24/87 at 11-12. The Court reserved decision on the additional subclassifications proffered by defendants.

As is developed more fully below, the Court determines upon consideration of the rest of the parties' cross-motions, that further subclassification of the plaintiff class is warranted. For purposes of plaintiffs' Count 1 claim only, alleging a violation of the reporting and disclosure requirements in § 1022 of ERISA, the plaintiff subclass of employees who retired before April 1983 is further subdivided into those employees who retired prior to 1975 and those who retired between 1975 and April 1983. The year 1975 is a crucial date for plaintiffs' ERISA claim, because that is the year ERISA became law and its disclosure requirements became applicable to defendant's summary plan descriptions. As with this Court's prior decision, this determination is without prejudice to further subclassification.

II. CROSS-MOTIONS FOR SUMMARY JUDGMENT

On a motion for summary judgment, the Court must determine whether "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

matter of law." Fed. R. Civ. P. 56(c). An issue of fact is "material" only when the dispute is over facts that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The substantive law identifies which facts are material. *Id.* The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* Thus, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Id.* at 247-48. The Court must also consider the record in the light most favorable to the party opposing the motion. *Betz Laboratories, Inc. v. Hines*, 647 F.2d 402, 404 (3d Cir. 1981). Keeping this standard in mind, the Court will proceed to address each count of the complaint in turn.

A. Count I—ERISA Claim

The parties agree that Curtiss-Wright's post-retirement health benefit plan is an "employee welfare benefit plan" governed by the provisions of ERISA, 29 U.S.C. § 1002(1). ERISA was enacted to protect the interests of employees covered under employee benefit plans. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). One way in which this was done was by providing a private right of action to any beneficiary to enforce the terms of a welfare benefit plan. *See* 29 U.S.C. § 1132(a)(3)(B)(ii).

ERISA sets various uniform standards for employee welfare benefit plans. To fulfill its curative aim ERISA and its standards are to be given a liberal interpretation to safeguard the interests of fund participants and beneficiaries and to preserve the integrity of fund assets. *Gilliam v. Edwards*, 492 F. Supp. 1255, 1261 (D.N.J. 1980). Welfare benefit plans are expressly excluded from ERISA's vesting and participation requirements and its funding requirements. *See* 29 U.S.C. § 1051(1), 1081(a)(1). Nor is any other provision of ERISA which restricts cancellation or change applicable to such plans. Accordingly, ERISA does not prevent elimination of previously offered benefits so long as they are not vested or

accrued. *Viggiano*, 750 F.2d at 279-80. *See also Henne v. Allis-Chalmers Corp.*, 660 F. Supp. 1464, 1471 (E.D. Wisc. 1987). Welfare plans, however, are subject to the statute's reporting and disclosure requirements, 29 U.S.C. §§ 1021-1031, and its standards of fiduciary conduct governing an employer's administration of the plan. 29 U.S.C. §§ 1101-1114. The parties agree that defendant Curtiss-Wright is the plan administrator of the employee welfare benefit plan at issue here and, thus, is a fiduciary to the plan. 29 U.S.C. § 1002(14), (16), (21).

The plaintiff subclass which left active employment prior to April 1, 1983 offers several arguments in support of their motion for partial summary judgment on their ERISA claim in Count I. First, they contend that defendant, as a fiduciary under ERISA, breached its duty to comply with the Act's reporting and disclosure requirements, specifically the requirement to disclose in the summary plan description the circumstances which may result in ineligibility or loss of benefits. *See* 29 U.S.C. § 1022(b). Secondly, plaintiffs assert that the great weight of authority holds that unless there is an express and unambiguous provision in a plan document made contingent upon specific events, *e.g.*, cessation of contributions, courts will not uphold the termination of post-retirement health insurance benefits, citing *In re White Farm Equipment Co.*, 788 F.2d 1186 (6th Cir. 1986). Pl. Memo. at 33. Accordingly, plaintiffs urge this Court to find that Curtiss-Wright failed to reserve its right to terminate the post-retirement health insurance benefits of its non-union Wood-Ridge employees prior to 1983 and thus, subsequently, termination of these benefits violated the express terms of the plan documents and was arbitrary and capricious.[6] Finally, plaintiffs claim defendant breached its fiduciary duty under ERISA by terminating their post-retirement health benefits.

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[6] This second claim asserted under Count I is in essence identical to Count II, which asserts a cause of action for federal common law breach of contract under ERISA. Accordingly, this argument is incorporated in and will be addressed under Count II.

Defendant Curtiss-Wright opposes plaintiffs' motion and cross-moves for summary judgment as to all plaintiffs on the same three legal points raised in plaintiffs' motion.

2. Breach of Disclosure Obligation under ERISA

In Count I, plaintiffs allege that defendant's actions in terminating their post-retirement health benefits violated ERISA. In their instant motions, plaintiffs specifically claim that the defendant violated ERISA when it breached the fiduciary duties imposed by § 1104 by failing to comply with the Act requirement that a summary plan description disclose the circumstances which may result in a termination of benefits.

Under ERISA, "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument . . ." 29 U.S.C. § 1102(a)(1). This writing, or plan description, "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a)(1). The reporting and disclosure requirements of ERISA specifically provide that the employee benefit plan description and summary plan description shall contain the following information:

> The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, title, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; *circumstances which may result in disqualification, ineligibility, or denial or loss of benefits*; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and

> whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title)

29 U.S.C. § 1022(b) (emphasis added).

The reporting and disclosure requirements are further detailed in the regulations promulgated by the United States Department of Labor pursuant to this provision of ERISA. Under these regulations, the summary plan description "must not have the effect [of] misleading, misinforming or failing to inform participants and beneficiaries" with respect to pertinent provisions of the plan. 29 C.F.R. § 2520.102-2(b) (1987). Furthermore, the summary must contain

> (1) For both pension and welfare benefit plans, *a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide* on the basis of the description of benefits required by paragraphs (j) and (k) of this section.

29 C.F.R. § 2520.102-3(1) (emphasis added). Accordingly, the summary plan description must be written in a manner reasonably calculated to apprise the average participant of any rules that would occasion a loss or reduction of benefits and "must not mislead, misinform, or fail to inform participants and beneficiaries of the Plan." *Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180, 1185 (3d Cir. 1985). Representations made in a fiduciary capacity cannot have the effect of misleading or misinforming plan participants, nor can necessary information be withheld. *Id.*; *Morse v. Stanley*, 732 F.2d 1139, 1147 (2d Cir. 1984).

These reporting and disclosure requirements were enacted because Congress felt that "[i]t is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these con-

ditions were stated in a misleading or incomprehensible manner in plan booklets." H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4646. *See also* S. Rep. No. 127, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4847. The disclosure standards of ERISA represented a major departure from earlier reporting and disclosure requirements applicable to employee pension benefit plans. ERISA was designed to disclose more significant information about plans and to provide participants and beneficiaries with specific data as to their rights and benefits under the plan and the circumstances which may result in loss of entitlement to these benefits. *Id.* at 4649-49. This intent is clearly stated in the report of the House Education and Labor Committee:

> [E]xperience has shown that the limited data available under the present Act is insufficient. Changes are therefore required to increase the information and data required in the reports both in scope and detail. Experience has also demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan—what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan have been entrusted.

Id. at 4649.

In the present action, plaintiffs contend that while the defendant did furnish summary plan descriptions to participants and beneficiaries, these descriptions did not fully comply with the disclosure requirements set forth in § 1022 of ERISA and the Department of Labor regulations promulgated pursuant thereto. These summaries allegedly failed to "clearly identify the circumstances under which the plaintiff retirees' post-retirement health benefits could terminate" as required under ERISA.

Plaintiffs rely on the testimony of Richard A. DuBois, Director of Employee Benefits for Curtiss-Wright from 1979 to 1984, to support its argument. According to DuBois, when defendant closed its Marquette facility in Ohio in 1980 and terminated health insurance coverage for retirees who retired from that location, the retirees sued over the termination of benefits. It was at this time, DuBois states, that he realized that Curtiss-Wright's plan documents may not have complied with the spirit of ERISA by clearly setting forth circumstances under which the Wood-Ridge retirees' health benefits could be terminated:

> Q: Why was this new language added to the new booklet; if you recall?
>
> A: Well, the intent in producing a summary plan description is to make the rights and entitlements of the recipients of the coverage entirely clear to them and in the spirit of the ERISA law we try to do just that. Obviously, you cannot cover each and every eventuality. We made a very earnest attempt to do just that. Here what we mean by this language, the fact that I, as a benefits professional, might be able to take a predecessor booklet and interpret it in very much the same way. Okay. You can't rely on every employee having my depth of expertise in benefits. I know what it means. I knew the interpretation. I know what the intent was. The employee may feel otherwise, but in the spirit of the ERISA law, we said we're going to make this thing as crystal clear as we can.
>
> Q: Are you aware that ERISA requires that the book be capable of being understood by the average plan participant?
>
> A: Yes, I am very much.
>
> Q: You were concerned that the prior book might not be understood by the average plan participant?
>
> A: Yes. I had concerns along those lines.

Q: Did that concern stem from the dispute which arose at the closing of the Marguette facility?

A: It certainly did.

Q: In that case, did the plan participants believe that their benefits were not terminable?

A: Yes, they believed it was not.

Q: In fact, they sued the Curtiss-Wright Corporation?

A: In fact, they did.

* * *

Q: As a result of your concern, did you ever ask anyone at Curtiss-Wright to review the termination language contained in the booklet that was issued prior to [the booklet containing language that benefits would terminate if the plant from which you retired closed]?

A: Not as a specific review of that, and I will tell you why that is. We had some changes in our insurance program. We switched from Prudential to Blue Shield. The time was right to put out a new booklet anyway. In so doing, let's make it better than the old booklet. (pp. 20-22, *See* Exhibit T).

Memo. of Law at 27-28.

Plaintiffs also rely on the testimony of Aaron Carr, Esquire, Labor Counsel for defendant Curtiss-Wright since 1978, in which he stated that he became similarly concerned that the termination language in the defendants' benefit plan booklets was not sufficiently clear after he learned of the district court decision in *International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). In *Yard-Man*, the Sixth Circuit held that Yard-Man's termination of life and health insurance benefits of its retired employees at the expiration of the collective bargaining agreement was improper. *Id.* at 1478. The Court concluded that the retirees were entitled to continued insurance benefits because from the language of the collective bargaining agree-

ment it was possible to discern that the parties intended to create non-terminating life-long insurance benefits. *Id.* at 1480. It was Mr. Carr who drafted the termination language that ultimately appeared in the summary plan description distributed after February 1, 1983, which for the first time addressed the issue of termination of benefits if the plant from which the retiree retired closes.

Curtiss-Wright opposes this motion on the grounds that "[t]hrough its 1976 benefit book published by Prudential and its 1983 benefit book published by Blue Cross/Blue Shield," it complied with the disclosure requirements of ERISA. Def. Brief at 19. Specifically, defendants contend that:

> The booklets were clearly and simply written; they were accurate and comprehensive, and they contained all of the information designated by the statute and regulations, including the information directly at issue herein: "circumstances that may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b).

Id. Accordingly, defendant argues that plaintiffs were clearly advised their health benefits were terminable upon termination of the plan or termination of coverage for the class of employees of which they were a member. Defendants assert that either of these provisions could be found to have "simply and clearly advised participants of the contingency that in fact caused them to lose coverage under that plan in February 1983 and additionally advised them of the contingency that caused them to lose coverage later that year under the Blue Cross/Blue Shield Plan." *Id.* at 21. No statement is made by Curtiss-Wright in its brief as to its pre-ERISA (pre-1975) plan documents, nor have plaintiffs alleged a violation of pre-ERISA reporting and disclosure requirements as set forth in the Welfare and Pension Plans Disclosure Act.

The dispute between the parties centers on whether the summary plan descriptions issued by Curtiss-Wright satisfies the requirements of § 1022, instituted in 1975, and on whether a violation of that provision entitles the plaintiffs to retroactive restoration of their benefits. The Court agrees with the defendant that its decision in this case must be based on

the principles enunciated by the Third Circuit in *Genter v. Acme Sales & Supply Co.* The Third Circuit in *Genter* stated that under ERISA the eligibility requirements for participation and benefits *shall* be in the plan description and that the summary plan description *must* not mislead, misinform or fail to inform participants and beneficiaries of the plan. 776 F.2d at 1185 (emphasis added). There, the surviving spouse of a deceased employee of Acme Sales brought suit for life insurance benefits due her as the beneficiary of her husband's employer-sponsored contributory life insurance plan. The life insurance plan provided that upon reaching a designated salary plateau, an employee could receive the prescribed increase in life insurance by returning a notification card to the employer within 60 days of the anniversary date of the policy. The midstream method, a second method not described in the plan documents but utilized by the employer on selective occasions, allowed increases at times other than the anniversary date of the plan. Plaintiff's deceased husband received a salary increase to put him over the $20,000 plateau on January 11, 1982, thereby allowing for increased life insurance coverage to $20,000. Unfortunately, the decedent died a year after he received his salary increase and two months before an increase in insurance based on that raise could go into effect pursuant to the anniversary method.

In *Genter*, the plaintiff contended that the plan documents did not advise employees of their right to apply immediately at the time of a salary increase for increased life insurance coverage under the midstream method. Had this information been properly provided, the plaintiff argued that her husband could have applied for and been provided with life insurance coverage of $20,000 at the time of his death rather than the $10,000 that was in force at that time. The Third Circuit concluded that the district court erred in granting summary judgment on behalf of the defendant, denying the plaintiff's motion for summary judgment. In reaching this conclusion, the court found that

> the plan documents only advise an employee, in clear and plain terms, of his right to an anniversary date

> increase in his insurance level. There was never any information provided as to a midstream increase, even though the employer and the insurance company do not dispute the fact that such midstream privileges were permitted under the Plan in respect to certain employees. The failure to provide a clear and plain statement of the Plan description is a violation of ERISA, 29 U.S.C. § 1022(a)(1), for which, had the decedent known, he could have considered the midstream increase option that other employees exercised.

776 F.2d at 1185-86.

The Third Circuit in *Genter* seems to imply that deficiencies in the summary plan description are sufficient in themselves to permit the plaintiff to recover the higher amount of life insurance. *Id.* This is evident from the quotation above wherein the court found an ERISA violation in the absence of any evidence of reliance, but based on the court's assessment that had the decedent known of the second option for increasing insurance, he *could* have exercised that option. *Id.* at 1156. While it is clear the *Genter* court did not require the plaintiff to establish reliance as a prerequisite to recovery under § 1022, an implicit finding of prejudice may be gleaned from the court's analysis:

> Where we believe the court below erred in finding for the defendants was in limiting the decedent's rights under the life insurance policy solely to the anniversary date method insurance increase which the decedent had not requested prior to his death. If the decedent had known for the full year before he died that he had the right to increase his insurance midstream by a clear and plain explanation of that right in the insurance documents, he would have had the right any time during that year, but not the obligation, to request and receive the increased coverage. By reason of his death no one will know what his true preference would have been had he known of the midstream options. *It is the employee's right to be informed of his rights however, rather than*

> *the wisdom of the employee's decision concerning these rights that the Act is intended to protect. Whether he would have opted for more coverage is not necessary for us to consider. What is necessary to consider is the circumstance that his beneficiary has been denied the additional $10,000.00 of coverage that the decedent could have provided for her had he been properly informed.*

Id. (emphasis added). The *Genter* court reversed the district court's grant of summary judgment for the defendant's employer and employer administrator and directed the district court to enter judgment in favor of the plaintiff.

Where a plaintiff is seeking to invalidate a plan or to be awarded money damages or retroactive benefits based on a violation of ERISA's disclosure provision, 29 U.S.C. § 1022, most decisional law requires a showing of active concealment or of some significant reliance upon or possible prejudice flowing from a faulty summary plan description. *See, e.g., Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985) (active concealment); *Govoni v. Bricklayers, Masons & Plasterers International Union, Local No. 5 Pension Fund*, 732 F.2d 250, 252-53 (1st Cir. 1984) (reliance or prejudice); *Lee v. Union Electric Co.*, 789 F.2d 1303, 1308 (8th Cir.), *cert. denied*, 107 S. Ct. 460 (1986) (reliance or prejudice); *Hillis v. Waukesha Title Co.*, 576 F. Supp. 1103, 1109-10 (E.D. Wis. 1983) (reliance or prejudice); *Freund v. Gerson*, 610 F. Supp. 69, 71 (S.D. Fl. 1985) (reliance or prejudice); *Kochendorfer v. Rockdale Sash & Trim Co. Profit Sharing Plan*, 653 F. Supp. 612, 616 (N.D. Ill. 1987) (reliance or prejudice); *Henne*, 660 F. Supp. at 1474 (reliance or prejudice); *Ruotolo v. Sherwin-Williams Co.*, 622 F. Supp. 546, 550 (D. Conn. 1985) (reliance or prejudice). *See also* S. Bruce, *Pension Claims: Rights and Obligations* at 394 (1988) (reliance on, or injury from, the summary plan description statement or omission must be shown). In essence, these courts have found that an action for damages cannot lie for merely a "technical" breach of § 1022 or a procedural violation of ERISA. While the Third Circuit has not yet expressly addressed the question of whether reliance or prej-

udice is a prerequisite to recovery under § 1022, the Third Circuit panels in *Genter* and in *Baker v. Lukens Steel Co.*, 793 F.2d 509 (3d Cir. 1986), seem to have implicitly adopted a similar prerequisite. In *Baker*, the court of appeals accepted the district court's statement of the law that failure to comply with ERISA's notice requirements alone is not sufficient for recovery, but that the employees must show they suffered injury which is remedial under ERISA. 793 F.2d at 512. The court in *Baker* reversed the grant of summary judgment by the district court finding a material issue of fact as to whether plaintiffs' misinformed motive or reliance for continuing in their employment constituted an injury remedial under ERISA. Similarly, the *Genter* court seems to imply that the element of prejudice was present there. Thus, this Court is not persuaded that the finding of a deficiency in summary plan descriptions are sufficient in themselves to permit the plaintiffs to recover their lost health benefits. Instead, plaintiffs are entitled to recover only if they can establish that their loss of health benefits was a result of reliance on or prejudice resulting from deficiencies in the summary plan descriptions.

In this Court's earlier decision denying summary judgment on plaintiffs' § 1022 claim, the Court found that the sufficiency of the summary plan descriptions for § 1022 purposes and correspondingly whether the defendant breached its fiduciary duty of disclosure would seem a mixed question of law and fact, depending on whether the Plan was one unending plan or a series of plans instituted then terminated. Plaintiffs assert that additional discovery has resolved this question. First, they present a January 23, 1983 letter from Curtiss-Wright to all retired employees announcing a "Notice of Change in Health Care Coverage from Prudential to Blue Shield." Lewis Aff., Exh. D. This letter stated that "Curtiss-Wright is shifting coverage . . . from Prudential to Blue Shield of New Jersey." *Id.* This change in insurers was not addressed as a plan termination. Moreover, Richard DuBois, defendant's Director of Corporate Benefits and Compensation testified at his deposition that the change in health care insurance carriers did not result in termination of the post-retirement insurance program. *Id.*, Exh. E at 32. Aaron Carr,

labor counsel for Curtiss-Wright, stated at his deposition that a change in insurance carriers caused one program to discontinue and another to begin, but he did not and would not say this change in carriers caused the plan to terminate. *Id.*, Exh. F at 22-23. And finally, plaintiffs proffer the 1983 and 1984 annual tax return of Curtiss-Wright's employee health benefit plan, in which questions as to whether the plan was terminated during these years or prior years was marked "no." *Id.*, Exh. B.

The nature and means by which defendant supplied post-retirement health benefits changed dramatically over time. The first issue is whether the summary plan descriptions issued by defendant met the standards established by § 1022 and the regulations promulgated thereunder.[7] It is clear that the 1983 booklets expressly reserving the right to terminate benefits if the plant from which an employee retired closed, were in compliance with the disclosure requirements of § 1022.

In 1975, ERISA and its disclosure requirement in § 1022 became applicable to retirement plans. The summary plan booklet in existence at that time at Curtiss-Wright, which was issued in 1973, informed employees that "[y]our benefits will continue throughout your retirement or until the date the class of persons of which you are a member ceases to be covered by the program." Pl. Statement of Uncontested Facts, Exh. E at 4. This ambiguous on its face, is even more confusing when you consider that nowhere in the summary plan booklet is there any explanation as to what "class[es] of persons" covered employees are divided into.[8] This booklet remained in effect until 1975.[9]

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[7] For purposes of plaintiffs' claim in Count I, that defendant breached ERISA's reporting and disclosure requirements, pre-1975 plan descriptions and summary plan descriptions are not pertinent.

[8] Classes of employees and retirees were listed in an addendum to the underlying plan document, but this listing does not aid Curtiss-Wright in defending a claim based exclusively on the summary plan description.

[9] These vague and ambiguous statements violate both the letter and the spirit of § 1022. However, the applicability of the act is questionable

As to the plans in existence from 1975 to 1983, no summary plan descriptions applicable to retirees have been produced. What has been placed into evidence before this Court is the summary plan description applicable to active employees, an undated document entitled "The Curtiss-Wright Executive Post-Retirement Health Benefits Program," and summary annual reports for the years 1979 to 1983. This Court cannot grant summary judgment for or against either party herein on a claim of breach of § 1022's disclosure requirements applicable to summary plan descriptions from 1975 to 1983 when the pertinent underlying documents on which this claim is based are not in evidence. Even for the summary plan document issued in 1973, which may be considered to have remained in effect until 1975, questions of fact exist as to its applicability to that time period. Moreover, if these documents are not ever produced, but reliance is paced on the provisions in the booklets produced applicable to active employees, questions of fact as to their applicability to retirees exist, precluding the granting of summary judgment at this state in this proceedings. There may be a time, however, that conclusions of law could be made without these documents, if and when parties determine copies of these documents cannot be found. Accordingly, as to that group of the plaintiff class who retired between 1975 and 1983, the cross-motions for summary judgment on Count I are denied.

Those employees who retired prior to 1975 are not automatically excluded from recovery for a violation of § 1022 just because they left employment prior to this time. In addition, proving that the summary plan documents issued between 1975 and 1983 violate § 1022, for this group of employees who retired before 1975 to recover damages or retroactive benefits for defendant's noncompliance with § 1022, the Court finds that they must make a showing of active concealment or establish reasonable or significant

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because the medical-surgical portion of defendant's plan was changed on January 1, 1975.

reliance upon or possible prejudice flowing from the inadequate summary plan description.[10] *See Govoni*, 732 F.2d at 252; *Genter*, 776 F.2d at 550. There is no evidence in the record of active concealment. Plaintiffs do not contend that Curtiss-Wright refused to let participants examine or obtain copies of the plan. Rather, the plaintiffs will need to adduce evidence of reliance or prejudice. The Court notes that the prejudice one would anticipate appearing in the record would be the retirees' inability to obtain other medical coverage. However, what is clear from the record is that all retirees whose insurance was terminated were given the option of converting their coverage into an individual plan, which is costing them money and where deductibles may be higher. *See* Lewis Aff. of 3/14/86, Exh. C.

Accordingly, the Court grants summary judgment to defendant finding as a matter of law that defendant did not violate § 1022 as to the plaintiff subclasses of employees who retired after April 1983. As to the claim of breach of § 1022 by the subclasses of employees who retired either before 1975 or between 1975 and 1983, the cross-motions for summary judgment are denied because the record as it stands is incomplete and accordingly genuine issues of material fact exist precluding summary judgment.

2. Breach of Fiduciary Duty

Plaintiffs also claim in Count I that Curtiss-Wright breached its fiduciary duty under ERISA by terminating their post-retirement health benefits. This Court finds that plaintiffs cannot as a matter of law make out a claim for breach of fiduciary duty and that summary judgment will be granted to defendant.

Clearly, Curtiss-Wright breached no fiduciary duty when it discontinued previously offered nonvested, nonaccured benefits which ERISA does not prohibit a company from elimi-

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[10] This prerequisite to recovery of damages under § 1022, similarly applies to the subclass of plaintiffs who retired between 1975 and 1983. It is evident, however, that the burden on this subclass will be less onerous than that on the class of plaintiffs who retired prior to 1975.

nating. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S. Ct. 1893 (1987); *Sutton v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406, 410-11 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); *Anderson v. John Morrell & Co.*, 830 F.2d 872, 876 (8th Cir. 1987). *Cf. Shenango China Div. of Anchor Hocking*, 750 F.2d at 279-80. Congress clearly authorized an employer to administer its pension and benefit plans and in doing so required it to satisfy the exacting fiduciary standards imposed by ERISA. Congress, however, did not prohibit an employer who is a fiduciary from changing or terminating nonvested ancillary benefits. *Id. See also* H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4935. Accordingly, summary judgment is granted to Curtiss-Wright on plaintiff's breach of fiduciary duty claim.

B. Counts I and II—Federal Common Law Breach of Contract Claim

It is well settled that "federal courts are empowered to create a federal common law of pension plans under ERISA, in order to effectuate Congress' intent to preempt the area and create a comprehensive federal regulatory scheme." *Carl Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters & Employers Pension Fund*, 847 F.2d 113, 121 (3d Cir. 1988) (citations omitted). *See also In re White Farm Equipment Co.*, 788 F.2d at 1191 (federal court must develop its own rule of decision in cases involving welfare plans where ERISA itself furnishes no answer). A federal court should exercise its power to create federal common law based on a federal statute's preemption of an area only where the federal statute does not expressly address the issue before the court. *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986) (citing C. Wright, *Law of Federal Courts* § 60, at 283-84 (3d ed. 1976)). For example, at least one court has found a common law breach of contract claim based solely on the language of the employer's summary plan description cognizable under ERISA and, thus, governed by federal common law. *See*

Amato v. Western Union International, Inc., 773 F.2d 1402, 1418 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986).

This Court held in its earlier decision in this case that health benefits are not accrued benefits which are subject to ERISA's nonforfeiture provisions. Nonetheless, the Supreme Court has concluded that ERISA's broad preemption clause, 29 U.S.C. § 1144(a), establishes that welfare benefit plans are a concern of federal law exclusively even though ERISA itself may not expressly govern the issue. *See Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985); *Shaw*, 463 U.S. at 98-100. Accordingly, federal common law governs the question of an employer's right to terminate a welfare benefit plan under ERISA. *In re Reading Co.*, 72 Bankr. 258, 260 (E.D. Pa. 1987).

Plaintiffs' federal common law breach of contract cause of action in Count II and their breach of plan documents claim in Count I are of a similar nature, and will be addressed together. The subclasses of plaintiffs retired before April 1983 seek summary judgment on Count II on the grounds that Curtiss-Wright's promise to pay post-retirement health insurance benefits became binding once the plaintiff subclass provided substantial service to the corporation. These subclasses of employees allege they acquired a contractual interest in these benefits arising from the presence of a unilateral offer given by the employer and the acceptance by way of continued employment and eventual retirement by the employee, which contract was breached by defendant's discontinuance of these benefits.

These plaintiffs also seek judgment on Count I asserting that while welfare benefits do not vest, they are considered status benefits which carry with them an inference that they will continue so long as the prerequisite status is maintained unless there is an express provision in the plan making continuation of these benefits contingent upon specific events. Thus, plaintiffs claim that defendant's failure to expressly reserve its right to terminate insurance benefits prior to April 1983 violated the express terms of the plan documents. In essence, the Court interprets both of these breach of contract allegations, as distinguished from plaintiffs' claim premised

on defendant's alleged breach of its disclosure obligation under § 1022, as stating a federal common law claim for breach of contract arising out of defendant's express representations—both written and oral—that defendant's post-retirement health benefits would continue throughout an employee's retirement.

In opposition, defendant argues that it never offered lifelong benefits to its retirees, and thus plaintiffs' claim must fail as a matter of law. In the alternative, defendant contends that if the Court finds such an offer was in fact made, plaintiffs cannot succeed on this claim because they have not met their burden of proof with respect to the other elements needed to establish an actionable contract claim, *i.e.*, acceptance, consideration or reliance under a promissory estoppel theory.

Separate and apart from the requirements of ERISA, courts have held that "parties may themselves set out by agreement or by private design, as set out in plan documents, whether retiree welfare benefits vest or whether they may be terminated. In construing such agreements, courts may draw inferences or make presumptions as . . . court[s] [have] done in construing collective bargaining agreements providing welfare benefit plans." *In re White Farm Equipment Co.*, 788 F.2d at 1193: *DeGeare v. Alpha Portland Industries, Inc.*, 652 F. Supp. 946, 959 (E.D. Mo. 1986), *aff'd*, 837 F.2d 812 (8th Cir. 1988) (interested parties may provide for either the vesting or the termination of retired employees' welfare benefits). Although ERISA does not prohibit reduction or elimination of welfare benefits, an employer may bind himself to provide these benefits by contract or estoppel. *Id.*; *McNabb v. Michigan Consolidated Gas Co.*, 656 F. Supp. 866 (E.D. Mich. 1987). For an employer to contractually bind himself, "there must be a specific, if not written, expression of the employer's intent to be bound." *Anderson v. John Morrell & Co.*, 830 F.2d at 877. In this context, the analysis involves not statutory construction, but contract interpretation, *District 29, United Mine Workers v. Royal Coal Co.*, 768 F.2d 588, 590 (4th Cir. 1985), and, where necessary, a consideration of rel-

evant extrinsic evidence and the parties' intent and course of dealing. *Local Union No. 150-A, United Food & Commercial Workers International Union v. Dubuque Packing Co.*, 756 F.2d 66, 69-70 (8th Cir. 1985). *See also International Union, United Auto Workers v. Yard-Man, Inc.*, 716 F.2d at 1479-80. The dispositive inquiry is whether the employer intended to reserve the right to terminate benefits "in light of all the circumstances bearing upon the issue." *White Farm*, 788 F.2d at 1193.

The issue before the Court is whether Curtiss-Wright bound itself to continue plaintiffs' post-retirement health insurance benefits. Plaintiffs have the burden of showing that the parties intended retirees' benefits would be vested and not tied to the agreement which created them. *Dubuque Packing Co.*, 756 F.2d at 70.

In reviewing a denial of benefits, most courts of appeals have generally concluded that the judgment and interpretation of the plan administrator prevails so long as it is not arbitrary and capricious.[11] *See, e.g., Palino v. Casey*, 664 F.2d 854 (1st Cir. 1981); *Miles v. New York State Teamsters Conference*, 698 F.2d 593 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003 (4th Cir. 1985); *Dennard v. Richards Group, Inc.*, 681 F.2d 306 (5th Cir. 1982); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987); *Wolfe v. J.C. Penney Co.*, 710 F.2d 388 (7th Cir. 1983); *Short v. Central States, Southeast & Southwest Areas Pension Fund*, 729 F.2d 567 (8th Cir. 1984); *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149 (9th Cir. 1986); *Peckham v. Board of Trustees of the International Brotherhood of Painters Union National Pension Funds*, 653 F.2d 424 (10th Cir. 1981); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985): *Maggard v. O'Connell*, 671 F.2d 568 (D.C. Cir. 1982). *See also* Bruce, *Pension Claims: Rights and Obligations* 318 nn.87 and 88 (1988) and cases cited therein.

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[11] Some decisions set forth the full standard of "arbitrary and capricious, not supported by substantial evidence or erroneous on a question of law," while others simply state the standard as "arbitrary and capricious."

An alternative to or modification of the arbitrary and capricious standard has recently been adopted by the Third Circuit in *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134 (3d Cir. 1987), *cert. granted*, 108 S. Ct. 1288 (April 4, 1988). The *Bruch* court adopted a stricter standard of review, applying traditional principles governing construction of contracts in cases involving the denial of benefits to a group of employees by an "interested" employer/administrator of an unfunded pension plan. *Id.* at 145. A main concern of the court was that previously courts had routinely applied the deferential arbitrary and capricious standard "without stopping to ascertain whether the plan's funding obligations gave the plan administrator an interest adverse to the claimants with respect to the question whether benefits should be paid." *Id.* at 139.

The deferential arbitrary and capricious standard is a product of the law of trusts and the principle that the trustee must act solely for the benefit of beneficiaries. *Id.* at 141 (Restatement (Second) of Trusts § 170). An exception exists to this deferential standard when a conflict of interest threatens the trustee's impartiality. *Id.* Similarly, the *Bruch* court found dissatisfaction with the arbitrary and capricious standard in those contexts where the employer can profit from its decision to deny benefits. *Id.* at 140. Thus, the court found that in the absence of the safeguards which are present in the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)[12], which has also adopted the arbitrary and capricious standard for judging administration of pension plans for unionized employees, this standard should apply in only some ERISA contexts. *Id.* at 140.

The line which the *Bruch* court drew for when this standard should and should not apply is the same approach utilized in

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[12] Under § 302(c)(5) of the LMRA, employees and employers must be equally represented in the administration of pension and welfare funds and in the case of a deadlock on the administration of such a fund, the two groups will agree upon an impartial umpire to decide the dispute and if one cannot be selected, one will be appointed by the court. *See* §§ 302(c)(5) and 302(c)(5)(B).

the early LMRA cases: What is the employer's interest in these benefits? In the case of contractual benefits, an administrator's decision should be given *de novo* review, whereas with equitable benefits, the court should be more deferential. *Id.* at 141. The concerns of the court in *Bruch* regarding impartiality were described as follows:

> In the unfunded pension plan at issue in Count I of the complaint in this case, however, there is no assurance of the trustee's impartiality. The plan is controlled entirely by the employer, not by a group evenly divided between employer and employees. Because the plan is unfunded, every dollar provided in benefits is a dollar spent by defendant Firestone, the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket. As we have already seen, the [abuse of discretion] principle articulated in § 187 does not govern judicial review of such a trustee's decisions.

Based on the above, the Third Circuit in *Bruch* concluded that "[t]he principles of trust law instruct that when a trustee is thought to have acted in his own interest and contrary to the interest of the beneficiaries, his decisions are to be scrutinized with the greatest possible of care." *Id.* at 145. Since the trust at issue there provided severance benefits, a form of wages, the court determined that in construing the parties' agreement, it would utilize principles governing contract construction between parties bargaining at arms' length. *Id* at 145. Such an analysis dictated a middle course between the construction of the document offered by both sides, giving consideration to manifestations of the parties, current industry practice and past practice under the plan. *Id.* at 145-47.

The question before this Court is whether the employer here, who is also the plan administrator, had a personal interest which was adverse to the claimants or whether the party who is alleged to have benefitted from the challenged decision is not a beneficiary. If such is the case, *Bruch* governs.

If, on the other hand, the Court is presented with a situation where the trustee's decision aided one group of beneficiaries at the expense of another, or involved investment decisions where no conflict of interest was alleged, or concerned a plan administrator's decision to change the terms of a plan by offering different or fewer benefits, the *Bruch* court has made it clear that deference to the trustee's decision remains appropriate.

> Our decision today is also not meant to address the scope of judicial review accorded a plan administrator's decision to change the terms [of] a plan, by offering different or fewer benefits. *See Baker v. Lukens Steel Co.*, 793 F.2d 509 (3d Cir. 1986). An employer's freedom to alter the terms on which it offers employee compensation may well be broader than its discretion to construe those terms while they remain unchanged—and after they have induced reliance, as the terms of employment normally will.

Id. at 144 n.11. Similarly, subsequent Third Circuit decisions have noted that they do not understand the newly enunciated standard in *Bruch* to apply in a situation involving "personal claims for benefits." *Stiffler v. Equitable Life Assurance Society*, 838 F.2d 78, 83 n.7 (3d Cir. 1988). Since this Court finds genuine issues of material fact exist as to plaintiffs' federal common law breach of contract claim in Counts One and Two, this Court need not, at this juncture, determine which standard is more appropriate in this case. This approach, while cautious, is appropriate in light of the fact the Supreme Court has granted certiorari in the *Bruch*, case which it will hear and decide in its upcoming term.

From the institution of post-retirement health benefits in 1966 until 1971, booklets were issued stating that these benefits terminate upon (l) eligibility for medicare benefits, (2) the covered retiree's death, or (3) termination of the group *policy*. Pl. Statement of Uncontested Facts, Exhs. B and C (emphasis added). The clear meaning is that upon termination

of defendant's group policy with Liberty Mutual, benefits would be terminated. However, these booklets were far more specific as to termination of coverage than the underlying certificates of insurance. From 1971 until 1973 it is unclear what, if anything, employees were told as to termination of these new benefits. What is clear is that coverage riders concerning this period, which have been provided the Court, fail to reserve the right to terminate these benefits. According to the new summary plan description issued for the Blue Cross and Blue Shield coverage period from 1973 to 1975, the termination of benefits provision provided that "benefits will continue throughout an employee's retirement" or until the "class of persons of which you are a member ceased to be covered." *Id.*, Exh. E. The right of termination was limited to this narrow grounds of termination of benefits to the class of persons of which the employee is a member, with these classes nowhere defined except in a schedule outlining the class of employees eligible for coverage. These classes grouped retirees together and then split them up according to those retired before and after 1973. These categories did not distinguish retirees according to what plant they retired from.

In September 1976, upon changing insurers, defendant established a funded employee benefit plan for the purpose of providing for the payment of life, health and other employee benefits. Under the language of this plan, which is still in effect, the defendant reserved the right to modify or amend the plan. In addition, in the Plan's constitution the company reserved the right to terminate the Plan "for any reason at any time." England Aff., Exh. H at 5-7. New booklets were provided at this time, but none applicable to retiree classifications have been proffered to the Court. The booklet applicable to active employees has been provided the Court and reserves termination to (1) discontinuation of employment, (2) ceasing to be a member of a class eligible for coverage under the plan, and (3) discontinuation of the plan. Other summary descriptions of benefits issued after 1973 up through 1978 contained

no reservation of the right to terminate. However, summary annual reports for the years 1979 to 1983 did contain the general statement that the company reserved the right to discontinue or amend the plan.

Unable to resolve this question on the basis of the ambiguous contractual language recited above, the Court must look to extrinsic evidence to see if summary judgment should be granted. In addition to plan documents, the parties have presented deposition testimony and other documentation relevant to the question of whether Curtiss-Wright reserved the right to terminate medical benefits for pensioners.[13] Certain statements made by defendant's management or agents may have led employees to believe that they had contracted for a lifelong medical insurance plan. One plaintiff, William Litke, testified under oath that he was told at his exit interview that hospitalization benefits would continue "for the rest of his life." *Id.*, Exh. A at 17-18. John Dunning was similarly told during his exit interview with Mr. Kochinach that he would have hospitalization coverage "for the rest of [his] retirement." Alito Aff. of 6/26/88, Exh. C at 17-18. William Martone stated at his deposition that both Messrs. Foster and Cerami of defendant's personnel office reassured him, in the context of retirement concerns, that his wife would be covered by hospitalization until he was dead. *Id.*, Exh. E at 29-32. William Hanzalek stated at his deposition that he was told in his exit interview that he would have basic medical coverage for his retirement, which he understood to mean for the rest of his life. *Id.*, Exh. D at 40.

Other plaintiffs testified at their depositions that they turned down other employment opportunities because of the pay and benefits, including retirement benefits offered by Curtiss-Wright. *Id.*, Exh. E at 27. Others recall, while active employees, announcements by company executives that raises

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[13] The existence of this extrinsic evidence clearly distinguishes the instant action from that before the court in *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984), wherein the court's inquiry was limited to written documentation.

would be small or none would be given at all while reminding the employees, as incentive to stay on, of the good benefits provided by Curtiss-Wright both now and at their retirement. *See, e.g., Id.*, Exh. E (W. Martone) at 47-48; *Id.*, Exh. H (G. Abbamont) at 14-17; *Id.*, Exh. J (J. Colquhoun) at 19-21. Joseph Colquhoun, who was President of the Supervisory Council at Curtiss-Wright, recalls these "belt-buckling" talks by company executives as well as a one-on-one talk with the manager of personnel who told him that while raises were a problem the employees all had benefits which were good at retirement as well as during active service. *Id.*, Exh. J at 21.

Most telling, however, is the deposition testimony of Embra Foster, the Manager of Personnel at Curtiss-Wright's Wood-Ridge facility during some of the time relevant to the complaint. Mr. Foster testified that he had a set statement he gave retirees during their exit interviews, which included the representation that although certain medical benefits would stop upon retirement, other hospitalization benefits "would continue." Lewis Aff., Exh. B at 63-75. He stated that it was his understanding that these benefits would continue for life, and he told this to retirees. *Id.* Although he often remained vague in his statement and would just say the benefits "would continue," if asked he would specifically say they would continue for life or for retirement. *Id.*

Under these circumstances a more detailed inquiry into the effect of management representations is required. The Court believes that these deposition transcripts raise a material issue of fact that makes summary judgment inappropriate. It is well established that questions of intent, motive and credibility, all of which are brought into question here, are inappropriate for disposition by summary judgment. *Baker*, 793 F.2d at 572. Therefore, upon inspection of the plan documents and the extrinsic evidence and documentation relevant to plaintiffs' claim, the evidence does not unambiguously establish that Curtiss-Wright retained the right to terminate the medical benefits in effect for eligible pensioners. Acceptance of defendant's position would require the Court to ignore the

alleged representations made by defendant's agents to retirees at exit interviews and during employee meetings in which benefits were touted when raises were financially unfeasible. These representations raise genuine issues of material fact not only as to credibility and motive but also as to the reasonableness of plaintiffs' reliance on these statements. While there is still some question of whether defendant's plan documents may have met basic disclosure requirements under ERISA, all the documentation presented together with oral representations made by defendant's agents, clearly raise a genuine dispute as to whether these employees could have reasonably relied on the array of oral and written representations of the defendant, causing an injury remedial by ERISA, such that they are entitled to reinstatement of these benefits under a contractual or quasi-contractual theory.

For the reasons set forth above, the cross-motions for summary judgment on the federal common law contract claims raised in both Counts I and II are denied.

/s/ JOHN W. BISSELL
John W. Bissell
United States District Judge

DATED: August 12, 1988

Appendix H

Decision of the District Court on In Limine Motions September 19, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 84-4542

FRANK C. SCHOONEJONGEN, et al.,

Plaintiffs,

—vs—

CURTISS-WRIGHT CORPORATION,

Defendant.

Newark, New Jersey
Wednesday, September 19, 1990

MOTION

Before:

HONORABLE JOHN W. BISSELL,
United States District Judge

Appearances:

LEWIS, GREENWALD, KENNEDY, LEWIS,
CLIFTON & SCHWARTZ, ESQS.,
BY: THOMAS KENNEDY, ESQ.,
—and—
IRA CURE, ESQ.,
Attorneys for the Plaintiffs.

CARPENTER, BENNETT & MORRISSEY, ESQS.,
BY: ROSEMARY ALITO, ESQ.,
—and—
KEVIN DUFFY, ESQ.,
Attorneys for the Defendant.

AARON J. CARR, ESQ.,
Attorney for Defendant.

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record taken stenographically in the above entitled proceedings.

/s/ IRA N. RUBENSTEIN
Ira N. Rubenstein
Official Court Reporter

(Brief recess.)

THE COURT: Mr. Kennedy I think quite properly cautioned the Court about not focusing too narrowly and too exclusively just on the given word in a given case as being a bible for all issues. And I am mindful of that mention. It makes very good sense.

On the other hand, the Hozier case, whether one credits it fortunately or not is in many respects a blueprint of current Third Circuit thinking on a number of issues that are right at the very heart of the present litigation. For this Court to strain for one reason or another, either to distinguish Hozier or to adopt a wait and see attitude as to whether this particular case fit the Hozier tracks like a glove, I think would do a disservice to all litigants here, either in connection with the time and scope of this trial, the approximate ultimate rulings of this Court or, perhaps, the vulnerability of any decisions

which I might reach on Third Circuit review. I'm not going to be laborious here.

If I feel at some point during the course of the case a more extensive opinion on the issues are required, I have a right under the rules to supplement this oral opinion. The motion to dismiss the claim for promissory estoppel is granted.

I think that—excuse me—let me back up a minute. The Hozier case sets forth very clearly the unavailability of such a claim except in extraordinary circumstances. I do not agree with Mr. Kennedy that Hozier is to be strictly confined to circumstances where the argument advanced by way of promissory estoppel would, indeed, amended or somehow change the plan as opposed to supporting a different sort of argument. Indeed, of course, it is the defendants' arguments here that the promissory estoppel claim would do just that by amasculating the ability of the defendant in the area of welfare health benefits, non-vested benefits under ERISA to amend or terminate the same.

I think the distinction, in other words, that Mr. Kennedy draws is a distinction without material difference.

Secondly, we certainly don't have a Rosen case here in terms of looking for a comparable example of extraordinary circumstances. Rosen, frankly, in this Court's view, was almost ludicrous for the defendants there which included, I believe, the planned trustee himself to argue that where the employee had made contributions, that the employer has failed to make in order to keep its coverage alive, that that variation from the plan, because the employer made them rather and the employer deprived him of benefits.

What we really had there seems to me something in the nature of evidentiary estoppel indicating the defendants there would not be permitted in good conscience to take such a position before the Court. Here we would. The plaintiffs would seek essentially to establish by doctrine of promissory estoppel a separate contractual agreement which it would then perceive to enforce, I think both on its equities, at least on that nuance, if not otherwise, the Rosen is distinguishable.

Finally, I note that once again because it's a distinction drawn in the ERISA plan it's that Rosen involved pension benefits. If there is a stronger policy, as does appear to be under ERISA, towards vesting and none for the nature of pension benefits, Rosen, of course, serves that end. This is not a pension benefits case, as we all know.

The Court also grants the motion I will say, will mention one caveat: This, of course, is a preliminary ruling by the Court. I suppose in the nature of partial summary judgment. Although it might also be classified in the nature of a Rule 12(b)(6) motion in light of the—it's involving predominant issues of law which are highlighted in the Hozier opinion.

But as an interrogatory ruling it is not entirely preclusive. I note that only to the following extent. If in the course of the emergence of the evidence, particularly with regard to the proofs offered by the plaintiff, some facts or patterns begin to emerge where an argument might be renewed that we are dealing here with truly extraordinary circumstances, such as Rosen might have contemplated or other conceivable examples might illustrate, I would not preclude the plaintiffs from advancing once again an argument probably at or about the close of their proofs that such extraordinary circumstances had been established. I don't think that would significantly alter the progress of the hearings that would have to take place in this case. And so there is at least that one I must conceive in my own mind, remote possibility of the reemergence of the extraordinary circumstances.

I don't foresee it, I don't perceive it on the record presently before me. What I anticipate will be the record at trial for which we are all really quite familiar.

Secondly, any claims for the relief of the type sought by the plaintiffs here based upon a claim on the non-disclosure provisions of ERISA per se is also dismissed.

Once again, I feel that the Hozier analysis is complete. Pertinent, of course, in this Court, if you will. The analysis beginning at page 29 of the slip opinion which raises even the prospect of an employee failure to take his own steps to fill

gaps in the coverage of which he was unaware because of non-disclosure.

Even if that type of case which the plaintiffs argue is present here, Judge Becker held very firmly no remedy of benefits are available under the non-disclosure provisions in light of the specific statutory language limiting those provisions to others.

Third, the Court rules that the Yardman rule with regard to any presumption of status benefits in the area of health benefits which this case is involved with, does not apply. The Court will not endorse it. It will, of course, conduct this trial under a de novo review standard rather than disbuse of standard. Rule on the proofs as presented to him. But without the status benefits of presumption in this field, Yardman might intimate.

Finally, with regard to the issue of burden of proof concerning the terms of the respective plans and the strength of the sources of those proofs. This Court specifically declines to rule on that issue at this time. It is not crystal clear by any means under the cases that have come before the Court. Some of it may hinge, as it often does, under the Rules of Evidence with regard to whether there are amicabilities of whether one side or the other to have this evidence, have it preserved. Mindful, of course, that as to general proposition, the burden of proof by a preponderance of the credible evidence lies with the plaintiff.

Nevertheless, perhaps an argument can be made in terms of the reservation of rights to terminate that in the nature of a defense upon which the defendant may ultimately bear the burden of proof.

Another, if you will, of course, the contrary of that argument is that whereas here we are dealing with health benefits where the vesting provisions of the statute which deal with pension benefits do not apply. I can perceive an argument when the time comes raised by the defense that what remains and will remain the burden of the plaintiff throughout to prove a set of facts whereby the governing agreements estab-

lish virtually vested rights all through the statute would not require that. Those are issues which I think the Court cannot resolve at this time. They may be academic in light of the evolution of the proofs.

I know there are numbers of exhibits to be introduced by consent. They can be argued, I think, when the plaintiff formally rests. And I will say that I would not work a hardship on the plaintiff under its own exceptions where the burden of proof lay. I would—of course, I wouldn't preclude the possibility of reopening the plaintiff's case to give him an opportunity to comply with any Court ruling on the issue. I don't believe that leaves anything in connection with these motions for my adjudication on Friday morning. Accordingly, I'll be prepared to begin the trial that morning.

In light of not only these motions but the history of this case, I don't feel the need for oral opening statements on the other hand, unless, again, I don't preclude it. Particularly if the plaintiff would like to give this Court a bit of blueprint for its proofs and the witnesses who will be coming before the Court and, perhaps, the order of those witnesses certainly wouldn't preclude it. I'm just not saying.

THE COURT: Anything further before we adjourn?

MR. KENNEDY: I have one question, your Honor, that I believe is implicit in your comments. I wish to make it clear for purposes of preparing now and Friday.

Ms. Alito mentioned presentation. There it would be her contention the promissory estoppel claim were dismissed that evidence plaintiffs would offer regarding oral promises made to them and the documents that they have received would be inadmissible because they would not be within the terms of the plan.

It has been my understanding of the thrust of your ruling today, reading between the lines, your Honor, that you were not attempting, were not ruling the plaintiffs were unable to present evidence of those oral representations.

THE COURT: Not at this time. It may be that the most orderly pattern of proof presentation—I commend this only

for your consideration at this time—would be the introduction into the record formally of whatever documents existed during whatever relevant time periods, so that the Court, once again, now in this trial context can take a look at those, once again advise you what areas I feel there is ambiguity there isn't.

What areas I feel there are gaps and proof of the written documents to be supplied, perhaps, either by related writings or testimony. So that a clearer focus on those areas of the presentation of evidence outside the plan documents or SPDs themselves can be presented by me to you, but I am certainly not at this point, precluding you in advance of the presentation of the sort of evidence that you have mentioned, including what you had argued would be a pattern of interpretation of this agrees and exit interviews. It's that very type of evidence was considered appropriate in the Hozier opinion.

MR. KENNEDY: Yes, it was your Honor. I just wish to clear that up.

THE COURT: Thank you. Anything further, Miss Alito?

MS. ALITO: No, Judge.

THE COURT: All right. We'll see you 9:30 Friday morning. That will be our normal starting time for our trial days. I'll also advise you on Friday of any minor intrusions here and there along the way in our trial schedule. We have already discussed that somewhat in the past and I'll have a clearer picture for you on Tuesday morning. We're adjourned until that time.

(Matter adjourned.)

Appendix I

Judgment entered by District Court
(November 25, 1992)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 84-4542

FRANK C. SCHOONEJONGEN, *ET AL.*,

Plaintiffs,

—against—

CURTISS-WRIGHT CORPORATION,

Defendant.

LEWIS, GREENWALD, KENNEDY, LEWIS,
CLIFTON & SCHWARTZ, P.C.
Attorneys for Plaintiffs
355 Murray Hill Parkway
East Rutherford, New Jersey 07073
(201) 933-9494
(212) 382-0029

JUDGMENT

This action having been tried on liability issues only before the Honorable John W. Bissell on September 21, 25, 26, 28 and October 1, 2 and 3, 1990; a decision on liability having been entered into the record on October 4, 1990 a copy of which is annexed hereto as Exhibit A:

The parties having stipulated only as to the amount of damages inclusive of prejudgment interest that will be due to the class if Judge Bissell's decision on liability is affirmed on appeal; and that amount and method of distribution of that amount among the class members having been subject to notice and hearing and approved by the Court on November 9, 1992 as per the schedule annexed hereto as Exhibit B;

IT IS ORDERED AND ADJUDGED that the plaintiff class shall recover the sum of $2,681,086 inclusive of prejudgment interest and that postjudgment interest shall accrue in the manner set forth in 28 U.S.C. §1961;

IT IS FURTHER ORDERED AND ADJUDGED that the $2,681,086 shall be allocated to the members of the plaintiff class in the manner set forth in Exhibit B;

IT IS FURTHER ORDERED AND ADJUDGED that if at the time of distribution plainttiffs' counsel is unable, after a six-month period during which due efforts are made, to locate any class members, the money allocated to those unlocatable class members shall be distributed per capita among those remaining; and

IT IS FURTHER ORDERED AND ADJUDGED that there shall be a separate determination regarding plaintiffs' entitlement to attorneys' fees and costs.

/s/ JOHN C. LIFLAND
John C. Lifland, U.S.D.J.

Dated: November 20, 1992

Appendix J

Order of the Court of Appeals on Petition for Rehearing (March 3, 1994) Filed March 3, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 92-5695 and 92-5710

FRANK C. SCHOONEJONGEN; WESLEY L. LOSSON; JOHN S. DUNNING; WILLIAM MARTONE; WILLIAM V. HANZALEK; EDWARD F. ZIEK; MELVIN DEBLOCK; JOSEPH COLQUHOUN; JOSEPH MAJERSCAK; GERARD ABBAMONT; and OLGA WOLSEY, on behalf of themselves and all others similarly situated

v.

CURTISS-WRIGHT CORPORATION

Appellant in No. 92-5695

Frank C. Schoonejongen, Wesley L. Losson, John S. Dunning, William Martone, William V. Hanzalek, Edward F. Ziek, Melvin Deblock, Joseph Colquhoun, Joseph Majerscak, Gerard Abbamont, and Olga Wolsey, on their own behalf and on behalf of the class of persons they represent,

Appellants in No. 92-5710

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 84-04542)

Argued September 10, 1993

BEFORE: STAPLETON, ROTH and LEWIS,
Circuit Judges

ORDER

IT IS ORDERED that:

1. The petition for panel rehearing in No. 92-5695 is granted.

2. The opinion filed on December 28, 1993, is hereby vacated.

3. A revised panel opinion is hereby issued in the form attached to this Order.

4. The pending petition for rehearing before the full court in No. 92-5695 will be acted upon in due course following circulation of the attached amended opinion. This Order is without prejudice to the filing of a petition for rehearing addressed to the new portions of the attached opinion.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: March 3, 1994

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix K

Order of the Court of Appeals on Petition for Rehearing in Banc (March 14, 1994)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-5695

FRANK C. SCHOONEJONGEN, WESLEY L. LOSSON; JOHN S. DUNNING; WILLIAM MARTONE; WILLIAM V. HANZALEK; EDWARD F. ZIEK; MELVIN DEBLOCK; JOSEPH COLQUHOUN; JOSEPH MAJERSCAK; GERARD ABBAMONT; and OLGA WOLSEY, on behalf of themselves and all others similarly situated,

—v.—

CURTISS-WRIGHT CORPORATION,

Appellant

SUR PETITION FOR REHEARING

Before:

SLOVITER, *Chief Judge*,
BECKER, STAPELTON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD, ROTH,
and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to all the available circuit judges of the circuit in regular active service, and a majority of the circuit juges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ WALTER K. STAPLETON
Circuit Judge

Dated: March 14, 1994

Appendix L

Judgment of the United States Court of Appeals for the Third Circuit (March 3, 1994)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 92-5695 and 92-5710

FRANK C. SCHOONEJONGEN, WESLEY L. LOSSON; JOHN S. DUNNING; WILLIAM MARTONE; WILLIAM V. HANZALEK; EDWARD F. ZIEK; MELVIN DEBLOCK; JOSEPH COLQUHOUN; JOSEPH MAJERSCAK; GERARD ABBAMONT; and OLGA WOLSEY, on behalf of themselves and all others similarly situated,

—v.—

CURTISS-WRIGHT CORPORATION,

Appellant in 92-5695.

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 84-04542)

FRANK C. SCHOONEJONGEN, WESLEY L. LOSSON; JOHN S. DUNNING; WILLIAM MARTONE; WILLIAM V. HANZALEK; EDWARD F. ZIEK; MELVIN DEBLOCK; JOSEPH COLQUHOUN; JOSEPH MAJERSCAK; GERARD ABBAMONT; and OLGA WOLSEY, on behalf of themselves and all others similarly situated,

—v.—

CURTISS-WRIGHT CORPORATION,

Frank C. Schoonejongen, Wesley L. Losson; John S. Dunning; William Martone; William V. Hanzalek; Edward F. Ziek; Melvin Deblock; Joseph Colquhoun; Joseph Majerscak; Gerard Abbamont; and Olga Wolsey, on their own behalf and on behalf of the class of persons they represent,

Appellants in 92-5710.

Present:

STAPELTON, ROTH, and LEWIS, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on September 10, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered November 25, 1992, be, and the same is hereby affirmed. Costs taxed against appellants in each appeal. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. DOUGLAS SISK
Clerk

Dated: March 3, 1994

Costs taxed in favor of Appellees Frank C. Shoonejongen, et al in No. 92-5695 as follows

Total Costs $231.77

Certified as a true copy and issued in lieu of a formal mandate on March 25, 1994.

Teste: /s/ BRADFORD A. BALDUS

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit.

Appendix M

Stipulation of Facts from Final Pretrial Order and Stipulation of District Court (entered July 23, 1990; incorporated in Appendix C, Opinion of the District Court after Trial)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 84-4542

Filed July 23, 1990

FRANK C. SCHOONEJONGEN, et al.,

Plaintiffs,

—v.—

CURTISS-WRIGHT CORPORATION,

Defendant.

FINAL PRETRIAL STIPULATION AND ORDER

This matter having come before the Court at a pretrial conference held pursuant to Rule 16 of the Federal Rules of Civil Procedure and Lewis, Greenwald, Kennedy & Lewis, P.C. having appeared as counsel for the plaintiffs and Carpenter, Bennett & Morrissey having appeared as counsel for the defendant, the following Order is hereby entered:

1. JURISDICTION:

This Court has jurisdiction under Section 502 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §1132.

2. STIPULATION OF FACTS:

Defendant Curtiss-Wright Corporation is a Delaware corporation which was and is qualified to do business in the State of New Jersey. Defendant operated a production facility at Wood-Ridge, New Jersey for many years prior to November 30, 1983.

The named plaintiffs and the members of the class are all former exempt and non-exempt employees of defendant who were employed at defendant's Wood-Ridge facility. At the time each class member retired from employment at the Wood-Ridge facility, he or she was not represented by any union for the purpose of collective bargaining.

Defendant first provided post-retirement health benefits in 1966. [Under that program, post-retirement benefits were terminated upon eligibility for Medicare.] These post-retirement health benefits were provided as part of Curtiss-Wright's group health insurance plan and were completely paid by defendant.

Defendant was and is the plan sponsor and administrator of this program. The post-retirement health benefits program is an employee benefit plan within the meaning of ERISA and subject to the provisions of that law.

Post-retirement health benefits were provided to retirees from the Wood-Ridge facility commencing in 1966. Benefits were provided to retirees whose retirement commenced before that date. However, coverage was not extended to the retirees from all Curtis-Wright operation facilities across the United States.

In 1976, defendant established a trust agreement and Constitution, and since that time benefits have been provided through a series of "cost-plus" contractual arrangements with various insurance carriers. This form of funding differs from a typical insurance contract in that, rather than paying a premium, defendant accepts responsibility for the payment of all

claims and pays the insurance carrier a fixed percentage of claims paid as an administrative fee. The payments made by defendant under this system are broken down by facility based upon each facility's claim experience to be charged to that facility's government contract. They are further broken down by whether the retiree was a bargaining-unit member or an exempt or non-exempt employee.

The benefits provided to retirees from defendant's Wood-Ridge, New Jersey facility were terminated as of November 30, 1983.

Post-retirement health benefits for certain retirees whose last active employment for defendant was in other facilities have been continued: post-retirement benefits for certain other retires have been terminated; and certain other retirees never received post-retirement benefits at all. Those benefits have also been continued for those retirees whose last active employment was at Wood-Ridge but were considered "corporate" employees rather than regular employees at the Wood-Ridge facility at the time of their retirement.

From the institution of the post-retirement health benefits program in 1966 to January 1, 1971, retirees' benefits were provided by defendant pursuant to a contract with Liberty Mutual Insurance Company ("Liberty Mutual").

In connection with the coverage provided during this period, certificates of insurance were distributed to eligible retirees (Plaintiffs' Exhibit 1). In addition, two booklets or pamphlets describing the coverage of the post-retirement health benefits program were distributed to active employees and retirees (Plaintiffs' Exhibits 2 and 3). Page 9 of the first booklet distributed contains the following language regarding termination of these benefits:

> *Termination of Insurance*
>
> Your insurance, or that of a dependant, will terminate if you, of such dependent, becomes eligible for Medicare benefits under the Federal Social Security Act, in the event of your death, or if the Group Policy terminates.

> There is no extension of insurance following termination of insurance.

Page 8 of the second booklet distributed to employees and retirees contains similar language regarding the termination of benefits but eliminates any reference to Medicare. This booklet provides:

> *Termination of Insurance*
>
> Your insurance, or that of a dependent, will terminate in the event of your death, or if the Group Policy terminates.
>
> There is no extension of insurance for dependents following termination of their insurance.

Effective on January 1, 1971, defendant's health benefits were provided pursuant to a contract with Prudential Insurance Company ("Prudential"). Defendant's contractual arrangement with Prudential in this regard continued through January 1, 1973. With respect to this two-year period of coverage, the only documents which have been located are Coverage Riders to the applicable but unlocated Group Policy (Plaintiffs' Exhibit 4).

From January 1, 1973 until January 1 1975, such benefits were provided through contractual arrangement with Blue Cross/Blue Shield.

Sometime after January 1, 1973, a booklet prepared by Blue Cross/Blue Shield was distributed to participants and beneficiaries by defendant (Plaintiffs' Exhibit 5). Page 4 of the booklet contains the following language regarding termination of these benefits:

> Termination of Benefits . . . Your benefits will continue throughout your retirement or until the date the class of persons of which you are a member ceases to be covered by the Program. A dependent's coverage terminates when your coverage terminates or on the last day of the

month in which he or she ceases to meet the qualifications of an eligible dependent. In the event of your death, your dependents will continue to be covered until the end of the calendar month following the month of your death. However, should you or any of your dependents be receiving covered inpatient care at the time your coverage terminates, benefits will continue to be provided to the extent available for that confinement.

Curtis-Wright provided these post-retirement health insurance benefits through a group contract with the Hospital Service Plan of New Jersey under which Blue Cross benefits were provided (Plaintiffs' Exhibit 6) and the group contract with the Medical Surgical Plan of New Jersey under which Blue Shield benefits were provided (Plaintiffs' Exhibit 7).

On January 1, 1975, the insurance carrier for the medical-surgical portion of the post-retirement health benefit program was changed from Blue Shield to Prudential. The group contract with the Hospital Service Plan of New Jersey ("New Jersey Blue Cross") (Exhibit G) remained in effect, but the Blue Shield group contract (Plaintiffs' Exhibit 6) was superseded by a group policy obtained from Prudential.

The Blue Cross/Prudential combination of carriers providing post-retirement health benefit coverage remained in effect through February 1, 1983. In September 1976, defendant established the plan Constitution and entered into an Administrative Services Agreement with Prudential (Plaintiffs' Exhibit 9). Benefits under that agreement were to be provided only to specified classes of retirees. Among the groups specifically set forth in the agreement are:

14. All full-time Exempt Retired Salaried Employees located in the United States.

15. All full-time Retired Employees (other than Employees of Target Rock Corporation and Marquette Metal Products Company, subsidiaries of Curtiss-Wright Corporation), who (i) are in bar-

> gaining units represented by unions with whom the Employer has entered into collective bargaining agreements or (ii) are classified as full-time non-bargaining non-exempt Employees

Employees and retirees of Curtiss-Wright Corporation did receive a summary plan description, apparently prepared by Prudential, which describes the various benefits provided through that company to active employees (Plaintiffs' Exhibit 10). Post-retirement health benefits were described in various documents distributed by defendant between 1973 and 1983. These included summary plan descriptions, informal highlight sheets, letters, summary annual reports, and booklets.

Effective February 1, 1983, medical-surgical coverage with Prudential was terminated and a new contract with Blue Shield commenced. Hospital benefits continued to be provided through Blue Cross.

Sometime following the change to Blue Cross and Blue Shield on February 1, 1983, a new summary plan description booklet was distributed (Plaintiffs' Exhibit 13).

On November 4, 1983, defendant notified the retirees that Wood-Ridge facility would be closed at the end of the month and that the post-retirement health benefits were being terminated at that time for all individuals who retired from that facility.